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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ELECTIONS BOARD OF THE STATE OF WISCONSIN,

Petitioner,

v.

WISCONSIN MANUFACTURERS & COMMERCE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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115 pp

QUESTIONS PRESENTED

1. Whether the state can regulate advertisements broadcast within fourteen days of an election, that encourage the viewer to take action with regard to clearly identified candidates by describing their positions.

2. Whether the *Buckley v. Valeo* express advocacy standard can only be applied to advertisements that include the words listed in footnote 52 of that opinion of this Court.

3. Where a state statute incorporates this Court's *Buckley v. Valeo* express advocacy standard, whether the state is precluded from applying that state statute without further rulemaking.

LIST OF PARTIES

Actual parties to the proceedings in the Supreme Court of the State of Wisconsin were:

Elections Board of the State of Wisconsin

Petitioner herein,

Wisconsin Manufacturers & Commerce, WMC Issues Mobilization Council, Inc., ABC Corporation and XYZ Corporation,

Respondents herein.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Elections Board of the State of Wisconsin, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin entered on July 7, 1999.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported at 227 Wis. 2d 650, 597 N.W.2d 721

(1999) (Pet.-Ap. 1a-48a). The Wisconsin Court of Appeals did not consider this matter. The opinion of the circuit court for Dane County is unreported. (Pet.-Ap. 49a-85a)

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was entered on July 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes § 11.01(7)(a)1. provides:

11.01 Definitions.

As used in this chapter:

....

(7) (a) "Disbursement" means:

1. A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business), made for political purposes. In this subdivision, "anything of value" means a thing of merchantable value.

Wisconsin Statutes § 11.01(16)(a)1. and 2. provides:

(a) Acts which are for "political purposes" include but are not limited to:

1. The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum.

2. The conduct of or attempting to influence an endorsement or nomination to be made at a convention of political party members or supporters concerning, in whole or in part, any campaign for state or local office.

Wisconsin Statutes § 11.05(1) provides:

11.05 Registration of political committees, groups and individuals.

(1) COMMITTEES AND GROUPS. Except as provided in s. 9.10 (2) (d), every committee other than a personal campaign committee, and every political group subject to registration under s. 11.23 which makes or accepts contributions, incurs obligations or makes disbursements in a calendar year in an aggregate amount in excess of $25 shall file a statement with the appropriate filing officer giving the information required by sub. (3). In the case of any committee other than a personal campaign committee, the statement shall be filed by the treasurer. A personal campaign committee shall register under sub. (2g) or (2r).

Wisconsin Statutes § 11.06 provides:

11.06 Financial report information; application; funding procedure.

(1) CONTENTS OF REPORT. Except as provided in subs. (2), (3) and (3m) and ss. 11.05 (2r) and 11.19 (2), each registrant under s. 11.05 shall make full reports, upon a form prescribed by the board and signed by the appropriate individual under sub. (5), of all contributions received, contributions or disbursements made, and obligations incurred. Each report shall contain the following information, covering the period since the last date covered on the previous report, unless otherwise provided:

(a) An itemized statement giving the date, full name and street address of each contributor who has made a contribution in excess of $20, or whose contribution if $20 or less aggregates more than $20 for the calendar year, together with the amount of the contribution and the cumulative total contributions made by that contributor for the calendar year.

Wisconsin Statutes § 11.20 provides:

11.20 Filing requirements.

(1) All reports required by s. 11.06 which relate to activities which promote or oppose candidates for state office or statewide referenda and all reports under s. 11.08 shall be filed with the board. All reports required by s. 11.06 which relate to activities which promote or oppose candidates for local office or local referenda shall be filed with the appropriate filing officer under s. 11.02, except reports filed under s. 11.08.

(2) Preprimary and preelection reports under s. 11.06 (1) shall be received by the appropriate filing officer no earlier than 14 days and no later than 8 days preceding the primary and the election.

(2m) Election reports under s. 11.12 shall be received by the appropriate filing officer no earlier than 23 days and no later than 30 days after each special election, unless a continuing report is required to be filed

under sub. (4) on or before the 30th day after the special election.

Wisconsin Statutes § 11.38 provides:

11.38 Contributions and disbursements by corporations and cooperatives.

(1) (a) 1. No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

2. Notwithstanding subd. 1., any such corporation or association may establish and administer a separate segregated fund and solicit contributions from individuals to the fund to be utilized by such corporation or association, for the purpose of supporting or opposing any candidate for state or local office but the corporation or association may not make any contribution to the fund. The fund shall appoint a treasurer and shall register as a political committee under s. 11.05. A parent corporation or association engaging solely in this activity is not subject to registration under s. 11.05, but shall register and file special reports on forms pre scribed by the board disclosing its administrative and solicitation expenses on behalf of such fund. A corporation not domiciled in this state need report only its expenses for administration and solicitation of contributions in this state together with a statement indicating where

information concerning other administration and solicitation expenses of its fund may be obtained. The reports shall be filed with the filing officer for the fund specified in s. 11.02 in the manner in which continuing reports are filed under s. 11.20 (4) and (8).

3. No corporation or association specified in subd. 1. may expend more than a combined total of $500 annually for solicitation of contributions to a fund established under subd. 2. or to a conduit.

(b) No political party, committee, group, candidate or individual may accept any contribution or disbursement made to or on behalf of such individual or entity which is prohibited by this section.

(2) (a) This section does not affect the right of any individual to support candidates and purposes of the individual's own choosing or the individual's right to subscribe to a regularly published organization newspaper.

(b) This section does not prohibit the publication of periodicals by a corporation or a cooperative in the regular course of its affairs which advise the members, shareholders or subscribers of the disadvantages or advantages to their interests of the election to office of persons espousing certain measures, without reporting such activity.

(c) This section does not apply to any labor organization which is incorporated under ch. 181 prior to January 1, 1978.

(3) A violation of this section by an officer or employe of a corporation is prima facie evidence of a violation by the corporation.

(4) Any corporation which violates this section shall forfeit double the amount of any penalty assessed under s. 11.60 (3).

(5) An action against a corporation pursuant to a violation of this section may be brought either in the circuit court for the county in which the registered office or principal place of business of the corporation is located, or in the circuit court for the county in which the violation is alleged to have occurred. The proceedings may be brought by the district attorney of either such county, by the attorney general or by the board.

(6) Any individual or campaign treasurer who receives funds in violation of this section shall promptly return such funds to the contributor or donate the funds to the common school fund or a charitable organization, at the treasurer's option.

(7) This section may not be construed to authorize any national bank or any corporation organized by authority of any law of congress to make a contribution or expenditure as defined by federal law in connection with any election to state or local office which is prohibited by federal law.

(8) (a) A corporation or association organized under ch. 185 which accepts

contributions or makes disbursements for the purpose of influencing the outcome of a referendum is a political group and shall comply with s. 11.23 and other applicable provisions of this chapter.

(b) Except as authorized in s. 11.05 (12) (b) and (13), prior to making any disbursement on behalf of a political group which is promoting or opposing a particular vote at a referendum and prior to accepting any contribution or making any disbursement to promote or oppose a particular vote at a referendum, a corporation or association organized under ch. 185 shall register with the appropriate filing officer specified in s. 11.02 and appoint a treasurer. The registration form of the corporation or association under s. 11.05 shall designate an account separate from all other corporation or association accounts as a campaign depository account, through which all moneys received or expended for the adoption or rejection of the referendum shall pass. The corporation or association shall file periodic reports under s. 11.20 providing the information required under s. 11.06 (1).

(c) Expenditures by a corporation or association to establish and administer a campaign depository account of a political group need not be made through the depository account and need not be reported.

Wisconsin Statutes § 11.60 provides:

11.60 Civil penalties.

(1) Any person, including any committee or group, who violates this chapter may be required to forfeit not more than $500 for each violation.

(2) In addition to the penalty under sub. (1), any person, including any committee or group, who is delinquent in filing a report required by this chapter may be required to forfeit not more than $50 or one percent of the annual salary of the office for which the candidate is being supported or opposed, whichever is greater, for each day of delinquency.

....

(4) Actions under this section arising out of an election for state office or a statewide referendum may be brought by the board or by the district attorney of the county where the violation is alleged to have occurred, except as specified in s. 11.38. Actions under this section arising out of an election for local office or local referendum may be brought by the district attorney of the county where the violation is alleged to have occurred. If a violation concerns a district attorney or circuit judge or candidate for such offices, the action shall be brought by the attorney general. If a violation concerns the attorney general or a candidate for such office, the governor may appoint special counsel under s. 14.11 (2) to bring suit in behalf of the state. The counsel shall be independent of the attorney general and need not be a state employe at the time of appointment.

STATEMENT OF THE CASE

A. Background and Facts.

This case concerns the ability of the Elections Board of the State of Wisconsin to enforce a state statute that incorporates the constitutional standard set forth by the United States Supreme Court. In *Buckley v. Valeo,* 424 U.S. 1 (1976), the United States Supreme Court ruled that when states choose to regulate campaign speech by requiring disclosure of financial backing, states must apply the express advocacy standard. Only campaign speech which meets this standard can be regulated. In describing the express advocacy standard, the Court specifically stated that it applies to "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 80.

In Wisconsin, every political group which makes disbursements in excess of $25.00 must register with the state Elections Board and file financial reports with the state Elections Board which include an itemized statement disclosing the names of each contributor who contributed in excess of $25.00. Wis. Stat. § 11.05. Disbursement is defined generally as a payment or distribution made for political purposes. Wis. Stat. § 11.01(7)(a)1. Acts which are for political purposes are defined to include the making of a communication which expressly advocates the election, defeat, recall or retention of a clearly-identified candidate or a particular vote at a referendum. Wis. Stat. § 11.01(16)(a). Thus, Wisconsin has incorporated the express advocacy standard into its statute and requires regulation and disclosure only where disbursements meet the United States Supreme Court standard.[1] *Wisconsin Right to Life v. State Election Board*, 138 F.3d 1183 (7th Cir. 1998).

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[1] The full text of each of the statutes explained here is contained in the Constitution and Statutory Provisions Involved section of this petition.

This case stems from the broadcast by Wisconsin Manufacturers and Commerce and related corporations of campaign advertisements just prior to the November 1996 general election. The television and radio advertisements in question have been lodged with the Court in the form of one video cassette and one audio cassette. The identical 1-800 telephone number appears at the bottom of each television advertisement. The text of two examples appears below:

ATTACHMENT 1

State Senator Lynn Adelman is standing in the way of reform.

Voting against curbs on frivolous lawsuits that cost Milwaukee jobs.

What's worse, Adelman's made a career of putting the rights of criminals ahead of the rights of victims:

Voting to deny employers the right to keep convicted felons out of the workplace.

That's wrong.

That's liberal.

But that's Lynn Adelman.

Call Lynn Adelman.

Tell him honest working people have rights, too.

ATTACHMENT 2

You-make-the-call!

> Senator Chuck Chvala voted to increase income taxes, sales taxes, and capital gains taxes by over a billion dollars.
>
> Then he voted against the largest property tax cut in Wisconsin history.
>
> Is he:
>
> "A," A liberal?
>
> "B," A big spender?
>
> "C," Out of touch?
>
> Or "D," All of the above?
>
> If you said "D" all of the above, you made the right call!
>
> Make another right call to Chuck Chvala . . .
>
> He never met a tax he didn't hike.

On June 26, 1997, the Elections Board of the State of Wisconsin filed a complaint against the defendants alleging violations of Wisconsin's campaign finance statutes requiring registration and disclosure. The defendants are Wisconsin Manufacturers and Commerce (WMC), a non-profit corporation; WMC Issues Mobilization Council, Inc. (IMC), a nonstock, non-profit corporation that receives financial support from WMC; ABC Corporation (ABC), a corporation organized under Wisconsin law which is a member of WMC and provides financial support to IMC; and XYZ Corporation (XYZ), a corporation organized under Wisconsin law which is not a member of WMC but provides financial support to IMC.

The complaint alleges that in October 1996, the defendants sponsored and paid for television and radio advertisements that expressly advocated the defeat or election of certain incumbent candidates who were running in the November 5, 1996, general election. The complaint further alleges that because the advertisements were express advocacy, the defendants are subject to regulation under Wisconsin campaign finance laws. The complaint specifically alleges that the defendants have not registered in violation of Wis. Stat. § 11.05(1); have not made financial reports regarding contributions in violation of Wis. Stat. § 11.06(1)(a); have not filed financial reports with the Board of Elections in violation of Wis. Stat. § 11.20(1), (2) and (2m); and are therefore subject to the forfeitures provided for in Wis. Stat. §§ 11.60 and 11.38(4).

Furthermore, the complaint alleges that on March 14, 1997, the Elections Board ordered the defendants to comply with the registration reporting provisions of Wis. Stat. ch. 11 by April 15, 1997. Defendant IMC was ordered to file with the Board a complete campaign registration statement and a complete campaign finance report, showing all contributions made or received during the calendar year 1996, and showing all disbursements made or obligations incurred during the calendar year 1996. The defendant IMC failed to comply with the order issued by the plaintiff on March 14, 1997.

It is undisputed that each of the advertisements in question was broadcast within the geographical boundaries of the relevant Senate or Assembly district during the thirty days prior to the election. By the defendants' own records, the defendants paid approximately $72,378 for 227 advertisements targeting Lynn Adelman. They paid approximately $35,715 for 157 advertisements targeting Senator Chvala; $2,878 for 122 radio advertisements targeting Representative Plombon and Representative Wilder; an additional $19,798 for 103 television

advertisements targeting Representative Plombon; $19,798 for 103 television advertisements targeting Representative Wilder; $52,603 for 121 advertisements targeting Senator Drzewiecki; and approximately $108,563 for 171 advertisements targeting Senator Clausing.

B. The Circuit Court's Decision.

The defendants filed a motion to dismiss in the circuit court of Dane County. After consideration of the briefs and arguments of the parties, Judge Sarah O'Brien granted the defendants' motion to dismiss the complaint on January 16, 1998. Judge O'Brien concluded that the State of Wisconsin can regulate campaign advertising by applying the express advocacy standard in a manner consistent with the constitutional implications of *Buckley*, 424 U.S. 1. (Pet.-Ap. 72a-73a) She declined, however, to evaluate the specific advertisements at issue in the complaint by the express advocacy standard, and instead concluded that more notice to the regulated community is required before the state can apply the constitutional standard adopted by Wisconsin campaign finance statutes.

Judge O'Brien in her opinion wrongly assumed that the Elections Board has adopted the five criteria set forth in *Crawford v. Wittow*, 123 Wis. 2d 174, 366 N.W.2d 155 (Ct. App. 1985), as a test to define whether or not an advertisement is express advocacy, and wrongly concluded that the Elections Board is required to provide notice of how it does define whether an advertisement is express advocacy. (Pet.-Ap. 73a-77a) The Legislature incorporated the United States Supreme Court express advocacy standard in the Wisconsin statute and the constitutional standard speaks for itself. There is no obligation or duty on the part of the Elections Board to "flesh" out the meaning of the constitutional standard.

The United States Supreme Court as well as the United States Court of Appeals has given guidance to the state and reviewing courts as to what may constitute express advocacy. That is precisely why this case is before the Court. The state Elections Board has determined the advertisements at issue are express advocacy and defendants have, as a defense to the enforcement action based on that determination, asked for the Court to review that decision. No further definition or explanation of the standard is required. What is required is for the Court to determine whether it agrees or disagrees with the state Elections Board's determination that the advertisements at issue are, in fact, express advocacy.

C. The Supreme Court of the State of Wisconsin's Decision.

After granting a joint petition to bypass the Wisconsin Court of Appeals, the Supreme Court of the State of Wisconsin issued a split decision on July 7, 1999, affirming Judge O'Brien's Decision and Order. In the majority opinion, joined in by two of the justices, the court makes two findings. First, the court states that the definition of express advocacy is not limited to the specific list of examples in *Buckley* footnote 52. Second, the court finds that without further explanation from either the Legislature or the Elections Board, the state statute which incorporates the *Buckley* express advocacy standard deprives the defendants of due process. (Pet.-Ap. 10a-22a) Declining itself to apply the constitutional standard and make a determination as to whether the advertisements in question are express advocacy, the majority opinion affirms the lower court decision and holds that either the Board or the Legislature must give the regulated community more warning regarding the standards to be used to determine whether advertisements are or are not express advocacy, subjecting them to regulation under Wisconsin statutes.

A third justice, while formally concurring with the majority, wrote an opinion in which he states his position that disclosure to the electorate of the funding sources of advertisements like those in this case is essential to a healthy democracy and that the Elections Board's regulation of such advertisements is not a violation of free speech. (Pet.-Ap. 32a-33a) This justice states that he would have preferred to join a majority which declared that advertisements such as those at issue constitute express advocacy; he joined the majority to prevent a 3-3 vote. A fourth justice concurred in part and dissented in part declining to make any specific comment about whether the advertisements are express advocacy. One justice declined to participate in the case.

Finally, the chief justice and the remaining justice joined together in a dissenting opinion based on the majority's failure to apply the express advocacy standard. The dissenters criticized the majority for deferring to the Legislature or an administrative agency to take the lead in adding further definition to a United States Supreme Court constitutional standard. (Pet.-Ap. 45a-46a) The dissenting opinion states that the Board appropriately applied the standard in *Buckley* and that under such a standard, there can be no doubt that the advertisements at issue are "'exhortation[s] to vote for or against ... specific candidate[s].'" (Pet.-Ap. 45a-46a)

REASONS FOR GRANTING THE WRIT

This case is of great national importance. The question of which types of campaign advertisements can be regulated by states has become a controversial national issue. In her circuit court decision, Judge O'Brien notes that since the *Buckley* case was decided by the United States Supreme Court in 1976, election financing has changed dramatically. Although in 1978 reportable independent expenditures totaled $310,000, in the elections of the 1990's, expenditures

totaled as much as $10 million. She further noted that a study of issue advertisements run in the 1995-96 federal elections estimated that between $135 million and $150 million was spent on "issue ads", about one-third of the total spent on broadcast advertisements by all federal candidates. (Pet-Ap. 64a)

Throughout the country, there has been a great deal of media and public interest in the fact that interest groups are finding creative ways to spend money in support of candidates. The resolution of the issues at the heart of this case is essential to this national debate. If the advertisements in question are found to be a mere discussion of the issues as their proponents suggest, then such advertisements will allow interest groups to pay for campaign advocacy without disclosing the source of funding, and without compliance with other campaign funding regulations. This result would appear to be counter to the intent of the *Buckley* case in which the United States Supreme Court noted that disclosure is the least restrictive means of curbing the evils of campaign ignorance and corruption and that informed public opinion is the most potent of all restraints. *Buckley*, 424 U.S. at 67-68.

This case is not about the regulation of the content of campaign advertisements. The State of Wisconsin is not attempting to chill free speech by dictating what candidates can and cannot say in their political advertisements. The State of Wisconsin is attempting to enhance the election climate by enabling citizens to be more informed. By requiring disclosure of the funding sources of campaign advertisements, voters educate themselves by listening to the speech and learning who the speakers are. Whether or not advertisements such as those at issue in this case can be regulated is crucial. The voting public needs to maintain the right to know who has funded these advertisements.

The United States Supreme Court further articulated its intent to allow disclosure of funding sources when it stated that hiding the sources of funding of these advertisements would allow the defendants to serve as conduits for the type of direct spending "that creates a threat to the political marketplace." *Federal Election Com'n v. Mass. Citizens for Life*, 479 U.S. 238, 264 (1986) (*MCFL*).

A lack of resolution about the ability of states to regulate these types of advertisements further interferes with the states' abilities to limit corporate contributions to campaigns. Wisconsin is among the many states that have long-standing, established laws limiting corporations' abilities to use corporate funds to support specific candidates. In upholding a similar Michigan state law, the United States Supreme Court recently reiterated its holding in *Fed. Election Com'n v. Nat. Conserv. Pol. Action*, 470 U.S. 480, 497 (1985) (*NCPAC*), that the compelling governmental interests in preventing corruption supports the restriction of the influence of political war chests funneled through the corporate forum. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990). The defendants in this case are corporations. If these types of campaign advertisements are allowed to remain unregulated, corporate funders will continue to bypass this prohibition through the use of creative writing.

The Wisconsin Supreme Court's decision to require further legislation or rulemaking to explain an already established constitutional standard is in conflict with other federal district court decisions that have without hesitation applied the *Buckley* standard of express advocacy to similar facts. The 9th Circuit in *Federal Election Com'n v. Furgatch*, 807 F.2d 857, 863-64 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987) found that the advertisements at issue in that case were clear exhortations to vote against specific candidates and therefore when read as a whole were express advocacy and subject to regulation. Although arriving at the opposite conclusion, the Western District Court of Virginia in *Federal*

Election Com'n v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd* 92 F.3d 1178 (4th Cir. 1998) applied the *Buckley* constitutional standard to advertisements that were ultimately determined by the district court to not include express advocacy. *Id.* at 948

The Wisconsin Supreme Court's decision is similarly adverse to the United States Supreme Court's decision in *MCFL* in which the United States Supreme Court applied the *Buckley* express advocacy standard to a publication urging voters to vote for particular candidates. In that 1986 post-*Buckley* decision, the United States Supreme Court did not require further legislation or rulemaking to explain its previous decision. Rather it recognized that there was a distinction between the mere discussion of public issues or issue advocacy and express advocacy and proceeded to apply the *Buckley* standard to the facts before the Court. This Court in *MCFL* looked at whether the essential nature of the advertisements unmistakably advocated for the election or defeat of a named candidate.

Not only has the Wisconsin Supreme Court added a requirement that additional explanation of a United States Supreme Court constitutional standard is needed where other courts have readily applied the standard, but lower courts have "not been consistent in the way they have applied the standard." In the two cases noted above, for example, the federal courts disagreed on what express advocacy looks like. The *Furgatch* court found that the advertisement at issue was express advocacy because it directly attacked a candidate not because of any stand on the issues of the election, but for his personal qualities and alleged improprieties in the handling of his campaign. In *Christian Action Network*, the Western District of Virginia took a seemingly opposite approach.

In a related group of decisions, courts have inconsistently evaluated the language of particular legislation in determining whether the laws at issue are consistent with the

Buckley express advocacy standard. *See Maine Right to Life Committee v. Fed. Elect. Com'n*, 914 F. Supp. 8 (D. Me. 1996), *aff'd* 98 F.3d 1 (1st Cir. 1996), *cert. denied*, ___ U.S. ___, 118 S. Ct. 52 (1997); *West Virginians for Life v. Smith*, 919 F. Supp. 954, 956 (S.D. W. Va. 1996); and *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999).

In sum, this case presents important constitutional questions that regularly come before state and federal courts, in a national context that has changed greatly over the last 20 years. The constitutional issue being presented to the Court is whether regulation of campaign advertisements that advocate the election or defeat of particular candidates violates the First Amendment Freedom of Speech protection. When campaign-related speech is protected by the First Amendment and when the government interest in preserving a free and open election process justifies some restriction, have been important constitutional issues that the Court must continue to address.

The amount of money spent on campaigns and the technical resources available to campaign artists have changed a great deal since the Court addressed these issues in the *Buckley* decision in 1976. Much has been written by lower courts including the Supreme Court of the State of Wisconsin about footnote 52 of the *Buckley* decision. In that footnote the United States Supreme Court attempted to list specific examples of express advocacy. Some litigants, including the respondents, have argued that the footnote 52 list was intended to be a "bright line test" that renders advertisements which do not include words from the list, issue advertisements. The question of whether this list was intended to represent the universe of possibilities of express advocacy and whether new creative advertising can circumvent the spirit of *Buckley* is one question that needs to be addressed. (Pet. Ap. 67a-68a)

To add confusion to the discussion, some advocates have framed the debate by arguing that campaign speech is either issue advocacy or express advocacy. It would seem that the two are not mutually exclusive, however the law is unclear. This Court decided *Buckley* with no specific facts before it. Given the new electioneering climate, it would be extremely helpful for this Court to apply *Buckley* to specific facts which include actual 1990's campaign advertisements. Whether the Court's constitutional express advocacy standard requires additional elaboration by state statute or regulation is also a question that needs to be addressed. The answers to these questions will provide necessary guidance to lower courts and states as they grapple with the challenges of the changing campaign finance landscape.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

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NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 98-0596

STATE OF WISCONSIN : IN SUPREME COURT

Elections Board of the State of Wisconsin,

Plaintiff-Appellant,

FILED

JUL 7, 1999

Marilyn L. Graves
Clerk of Supreme Court
Madison, WI

v.

Wisconsin Manufacturers & Commerce, WMC Issues Mobilization Council, Inc., ABC Corporation and XYZ Corporation,

Defendants-Respondents.

APPEAL from a judgment and an order of the Circuit Court for Dane County, Sarah B. O'Brien, Circuit Court Judge. *Affirmed.*

¶1 N. PATRICK CROOKS, J. This case is before the court as a result of the parties' joint petition to bypass pursuant to Wis. Stat. § (Rule) 809.60 (1995-96).[1] The issue presented is whether the circuit court properly dismissed the complaint of the Elections Board of the State of Wisconsin

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[1] All references to the Wisconsin Statutes are to the 1995-96 version.

(the "Board") charging the respondents with various violations of the campaign finance laws contained in Wis. Stat. ch. 11 following the respondents' broadcast of several advertisements. The Board contends that respondents are subject to ch. 11 regulation because their ads had the "political purpose of expressly advocating" the defeat or re-election of the incumbent state senators and representatives named in the ads. We conclude that the respondents, when they broadcast the advertisements, lacked fair warning that the ads could qualify as express advocacy in Wisconsin under a context-based approach. The Board, in effect, engaged in retroactive rule-making in attempting to apply such an approach.

¶2 Since this violation of due process--fundamental fairness--is determinative of the issue of whether these respondents can be prosecuted for the ads involved, there is no need for us to decide whether the ads are express advocacy. We therefore affirm the circuit court's dismissal of the Board's complaint.

¶3 We also determine that the definition of the term express advocacy is not limited to the specific list of "magic words" such as "vote for" or "defeat" found in Buckley footnote 52. A context-based approach to defining express advocacy may present an attractive alternative, but we note that several courts have rejected such an approach.[2] If there is to be a further attempt to fashion a rule governing express advocacy advertisements, leaving that task is appropriately

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[2] As counsel for the respondents descriptively stated at oral argument, "A voyage into the question of context is not only a swamp for the judiciary, it's a voyage without end." Several cases, set forth later in this opinion, have discussed the issue of a context-based standard and voiced somewhat similar criticism.

left to the legislature or the Board, consistent with this opinion.

I.

¶4 The respondents in this action are four Wisconsin corporations. Respondent WMC Issues Mobilization Council, Inc., (IMC), is a non-stock, non-profit corporation which receives financial support from respondents ABC Corporation and XYZ Corporation. To protect their privacy, IMC has refused to name ABC and XYZ. Respondent Wisconsin Manufacturers & Commerce, a non-profit corporation, also provides financial support to IMC.

¶5 The Board is the state agency responsible for the administration.of the campaign finance laws in Wis. Stat. ch. 11 and other laws related to elections and campaigns. See Wis. Stat. §§ 5.05(l), 15.61. In the event of a ch. 11 violation involving a statewide election or the filing of a required report or statement, the Board may bring a civil forfeiture action under Wis. Stat. § 11.60. § 5.05(l)(c). The Board may seek injunctive or other relief to enforce laws governing elections and campaigns. § 5.05(l)(d). The Board also has the power to enact rules pursuant to Wis. Stat. ch. 227 to interpret and administer the election and campaign laws. See § 5.05(l)(f).

¶6 In late October, 1996, IMC produced advertisements referring to six incumbent state legislators who were hoping to be re-elected in the November 5, 1996, general election. Each ad described a legislator's vote on specific issues and encouraged viewers or listeners to call the legislator to express approval or disapproval of the

legislator's position.[3] The ads aired on television and/or radio stations in the relevant state senate and assembly districts.

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[3] Following is the full text of the advertisements:

> [1] State Senator Lynn Adelman is standing in the way of reform. Voting against curbs on frivolous lawsuits that cost Milwaukee jobs. What's worse, Adelman's made a career of putting the rights of criminals ahead of the rights of victims: Voting to deny employers the right to keep convicted felons out of the workplace. That's wrong. That's liberal. But that's Lynn Adelman. Call Lynn Adelman. Tell him honest working people have rights, too.
>
> [2] You-make-the-call! Senator Chuck Chvala voted to increase income taxes, sales taxes, and capital gains taxes by over a billion dollars. Then he voted against the largest property tax cut in Wisconsin history. Is he: "A," A liberal? "B," A big spender? "C," Out of touch? Or "D," All of the above? If you said "D" all of the above, you made the right call! Make another right call to Chuck Chvala . . . He never met a tax he didn't hike.
>
> [3] The following message is paid for by WMC Issues Mobilization Council, Inc. --- Businesses working in the public interest. There's still one team in Wisconsin with a perfect record. It's the tax team of State Representatives Dave Plombon and Mike Wilder. They agree on most everything, voting with the Madison liberals nearly 100% of the time. In the State Assembly, Plombon and Wilder voted against cutting property taxes for Chippewa Valley homeowners. Working together, they voted against spending controls on local government. Plombon and Wilder even voted against millions in additional state aid for Chippewa Valley schools. State Representatives Dave Plombon and Mike Wilder. The tax team of the Chippewa Valley. Liberal on taxes and spending. Wrong on education. If you don't like the way the tax team is playing with your money, call them at 1-800-362-9472. Tell them Chippewa Valley homeowners deserve lower taxes and our kids deserve better schools.

¶7 The legislators featured by the ads filed administrative complaints with the Board against IMC, contending that the advertisements subjected IMC to regulation under Wis. Stat. ch. 11. When the Board did not

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[4] Representative Dave Plombon voted against the largest property tax cut in Wisconsin history. More than 15% for the average Chippewa Valley homeowner. Then Plombon voted against an additional 21 million dollars in state aid for schools right in his own district. Dave Plombon. Less money for our children. Higher taxes for us. Call Dave Plombon today. Because if he's consistently voting against the Chippewa Valley, just who is he voting for?

[5] State Representative Mike Wilder has a problem with taxes. He doesn't like to . . . cut them. When it came to a 14% cut in property taxes for the average Chippewa Valley homeowners, Mike Wilder said "No." And when it came to an additional 33 million dollars in state aid for schools right in his own district, Mike Wilder turned his back on us again. Give Mike Wilder a call. Tell him you've got a problem with high taxes, too.

[6] What has Gary Drzewiecki done for Northeast Wisconsin? Homeowners will see their property taxes cut by an average of 11.5% Our children's schools will receive millions in additional state aid. And taxpayers will get spending controls on local government. Lower taxes, less spending, better schools. It's a record we can all be proud of. Call Gary Drzewiecki and tell him thanks.

[7] This year, Wisconsin homeowners received their property taxes cut by almost 17%. No thanks to Senator Alice Clausing. She voted against the largest property tax cut in Wisconsin history. Then Clausing voted against an additional 36 million dollars for schools -- right in her own district. Alice Clausing. Liberal on Taxes . . . Wrong on education. Call Senator Clausing. Tell her to stop voting with those Madison liberals.

Compl., Attach. 1-7.

immediately address their complaints, the legislators sought injunctive relief under Wis. Stat. § 11.66 in circuit courts around the state. On October 31, 1996, the Dane County Circuit Court ordered a temporary injunction restraining IMC from broadcasting its advertisements. The circuit courts involved in the related suits swiftly did the same. IMC filed an emergency petition for a supervisory writ with the court of appeals. The court of appeals granted the writ in part and denied it in part, leaving the injunctions in place.

¶8 On March 14, 1997, the Board issued its order regarding the legislators' administrative complaints. The Board found that IMC had engaged in express advocacy and ordered IMC to comply with the provisions of Wis. Stat. ch. 11 by April 15, 1997. Specifically, the Board ordered IMC to file a campaign registration statement and a campaign finance report detailing all contributions made or received, and all disbursements made or obligations incurred, during 1996.

¶9 IMC refused to comply with the Board's order. The Board responded by filing the present action in Dane County Circuit Court on June 26, 1997. In its complaint, the Board alleged that IMC's advertisements had the "political purpose of expressly advocating" defeat or re-election of the named legislators. Therefore, the Board asserted, the four respondents (collectively, "WMC") were subject to various regulations under the campaign finance laws. The Board alleged that WMC failed to comply with the March 14, 1997, order[4] and had violated Wisconsin's campaign finance laws

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[4] Like the circuit court, we are unable to discern from the allegations in the complaint which of the four respondents the Board deems responsible for failing to comply with its March 14, 1997, order. Although the complaint alleges that all respondents failed to comply with the order by filing the required reports, it also states somewhat inconsistently that its order was issued only against respondent IMC. See Compl. ¶¶161-65; Decision and Order at 6 n.3.

by: (1) failing to register in violation of Wis. Stat. § 11.05(l);[5] (2) failing to file financial reports regarding contributions in violation of Wis. Stat. 11.06(l)(a);[6] (3) failing to file financial reports required by Wis. Stat. § 11.20(l) and (2);[7] and (4)

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[5] 5 Wis. Stat. § 11.05(l) provides:

> **Registration of political committees, groups and individuals. (1)** COMMITTEES AND GROUPS . . . . [E]very committee other than a personal campaign committee . . . which makes or accepts contributions, incurs obligations or makes disbursements in a calendar year in an aggregate amount in excess of $25 shall file a statement with the appropriate filing officer giving the information required by sub. (3) . . . .

[6] Wis. Stat. § 11.06(l) states:

> **Financial report information; application; funding procedure. (1)** CONTENTS OF REPORT. . . . [E]ach registrant under s. 11.05 shall make full reports, upon a form prescribed by the board and signed by the appropriate individual under sub. (5), of all contributions received, contributions or disbursements made, and obligations incurred. Each report shall contain the following information . . . :
>
> (a) An itemized statement giving the date, full name and street address of each contributor who has made a contribution in excess of $20 . . . .

[7] Wis. Stat. § 11.20 provides:

> **Filing requirements. (1)** All reports required by s. 11.06. which relate to activities which promote or oppose candidates for state office shall be filed with the board. . . .
>
> **(2)** Preprimary and preelection reports under s. 11.06(l) shall be received by the appropriate filing officer no earlier than 14 days and no later than 8 days preceding the primary and the election.

making contributions and/or disbursements for purposes unrelated to a referendum, in violation of Wis. Stat. § 11.38(1).[8] The Board sought per diem civil forfeitures as provided in Wis. Stat. §§ 11.60 and 11.38(4), costs, and an injunction requiring WMC to comply with the applicable statutory provisions.

¶10 WMC moved to dismiss the Board's complaint for failure to state a claim upon which relief can be granted. On January 16, 1998, the Dane County Circuit Court, Judge Sarah B. O'Brien presiding, granted WMC's motion. In a 29-page decision, the court determined that the Board could adopt a definition of express advocacy other than the one set forth by the United States Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), as long as that definition met the requirements of the First and Fourteenth Amendments to the United States Constitution. According to the court, the standard for express advocacy urged by the Board was a case-by-case determination based on the five-factor test of Crawford v. Whittow, 123 Wis. 2d 174, 183, 366 N.W.2d 155 (Ct. App. 1985),[9] and could not fairly

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[8] Wis. Stat. § 11.38 provides:

> **Contributions and disbursements by corporations and cooperatives. (1)** (a) 1. No foreign or domestic corporation . . . may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum . . . .

[9] In Crawford v. Whittow, 123 Wis. 2d 174, 183, 366 N.W.2d 155 (Ct. App. 1985), the court of appeals adopted the Board's five-factor test for determining whether an act was for "political purposes" under Wis. Stat. § 11.01(16). The court stated that the following factors should be considered: "(1) the distributor's intentions as to political office; (2) the content of the materials; (3) the manner of distribution; (4) the pattern

be applied to WMC because the Board had *not previously* published or formally adopted it. Further, the court reasoned, the Board's standard was unconstitutionally vague and was not sufficiently narrow to serve compelling governmental interests. Based on its conclusions, the court dismissed the Board's complaint with prejudice.

II.

¶11 We apply a de novo standard when reviewing a circuit court's dismissal of a complaint for failure to state a claim. Hermann v. Town of Delavan, 215 Wis. 2d 370, 378, 572 N.W.2d 855 (1998); Watts v. Watts, 137 Wis. 2d 506, 512, 405 N.W.2d 305 (1987). In our review, we must accept as true all facts in the complaint and all reasonable inferences which may be drawn from them. Watts, 137 Wis. 2d at 512. See Hermann, 215 Wis. 2d at 378. Dismissal is proper only when it is clear that the plaintiff would not be entitled to relief under any facts which could be proved. Hermann, 215 Wis. 2d at 378; Watts, 137 Wis. 2d at 512; Crawford, 123 Wis. 2d at 178.

¶12 In its complaint, the Board alleges that WMC is subject to regulation because its ads had the "political purpose of expressly advocating the defeat" or re-election of the featured legislators. Under Wis. Stat. § 11.01(16)(a)l, "[t]he making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate . . ." is an act for "political purposes." A payment made for "political purposes" may qualify as a "contribution" under § 11.01(6)(a)l or a "disbursement" under §

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and frequency of distribution; and (5) the value of the distributed materials." Crawford, 123 Wis. 2d at 183.

11.01(7)(a)1.[10] It is the respondents' contributions and/or disbursements that the Board asserts triggered the sections of ch. 11 allegedly violated by WMC. Accordingly, whether the Board's complaint has stated a claim upon which relief can be granted would seem to depend upon whether WMC's advertisements constitute express advocacy as provided in § 11.01(16)(a)l.

¶13 Statutory interpretation is a question of law which this court reviews de novo, although we are benefited in this case by the analysis of the circuit court. See Peters v. Menard, Inc., 224 Wis. 2d 174, 184, 589 N.W.2d 395 (1999); Forest County v. Goode, 219 Wis. 2d 655, 663, 579 N.W.2d 715 (1998). The main goal of statutory interpretation is to determine the legislature' s intent. Goode, 219 Wis. 2d at 663; UFE Inc. v. LIRC, 201 Wis. 2d 274, 281, 548 N.W.2d 57 (1996). Our first step is to examine the plain language of the statute. Peters, 224 Wis. 2d at 184; Goode, 219 Wis. 2d at 663. If the language is susceptible to only one meaning, we adopt that meaning and our analysis ends. Goode, 219 Wis. 2d at 663; UFE, 201 Wis. 2d at 281-82. If, on the other hand, reasonable minds could interpret the statutory language to mean more than one thing, the statute is ambiguous and we look to other sources to decipher the legislature's intended meaning. Peters, 224 Wis. 2d at 184-85.

¶14 Express advocacy is not defined in the Wisconsin Statutes. The meaning of the term has not been clarified in

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[10] "Disbursement" is defined by Wis. Stat. § 11.01(7)(a)l to mean "[a] purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value . . . made for political purposes." Similarly, § 11.01(6)(a)l defines a "contribution" as "[a] gift, subscription, loan, advance, or deposit of money or any thing of value . . . made for political purposes . . . ." Section 11.01(6)(a)4 states that "[a] transfer of funds between candidates, committees, individuals or groups subject to a filing, requirement under this chapter" is also a "contribution."

any published Wisconsin case, and the Board has not published a definition of express advocacy.[11] We turn, therefore, to other sources for aid in interpreting the term.

¶15 The express advocacy language was added to Wis. Stat. ch. 11 after the United States Supreme Court handed down its decision in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).[12] See § 27, ch. 328, Laws of 1979. In Buckley, the Court discussed the constitutionality of several provisions of the Federal Election Campaign Act of 1971

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[11] The Board's corresponding administrative regulation, like Wis. Stat. § 11.01(16)(a)l, refers to express advocacy without defining it. Wis. Admin. Code ElBd § 1.28 (Apr., 1998) provides in pertinent part:

> **(1)** Definitions. As used in this rule:
>
> . . .
>
> (b) "Contributions for political purposes" means contributions made to 1) a candidate, or 2) a political committee or 3) an individual who . . . makes disbursements for the purpose of expressly advocating the election or defeat of an identified candidate.
>
> **(2)** Individuais other than candidates and Committees other than political committees are subject to the applicable disclosure-related and recordkeeping related requirements of ch. 11, Stats., only when they:
>
> (a) Make contributions for political purposes, or
>
> . . .
>
> (c) Make expenditures for the purpose of expressly advocating the election or defeat of an identified candidate.

[12] Similarly, Wis. Admin. Code ElBd § 1.28 (Apr., 1998) was created by an emergency rule promulgated after Buckley. See Wis. Admin. Code ElBd § 1.28 (Jan., 1977). See also 65 Op. Att'y Gen. 145, 152, 154 (1976) (advising the Board to enact emergency rules adopting a narrow interpretation, consistent with Buckley, of the political activity regulated by certain sections of Wis. Stat. ch. 11).

("FECA").[13] Buckley, 424 U.S. at 6. The Court emphasized that protection of political speech lies at the heart of the First Amendment, stating, "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . . ."[14] Buckley, 424 U.S. at 14.

¶16 The Court explained in Buckley that the First Amendment right of association is closely related to the right of free speech. Buckley, 424 U.S. at 15. "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Id. (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)). The right to associate includes the right to band together for the purposes of advocating political ideas or beliefs. See id. at 15, 22. See also FEC v. National

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[13] The Court in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) actually considered the FECA as amended in 1974. See Buckley, 424 U.S. at 6 n.1. The relevant portions of the FECA are set forth in the Appendix to the Buckley opinion. See Buckley, 424 U.S. at 144-235.

[14] The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend. I. The First Amendment applies to the states through the Fourteenth Amendment. McIntyre v. Ohio Elections Commission, 514 U.S. 334, 336 n.1 (1995).

Free speech is also guaranteed by Art. I, § 3 of the Wisconsin Constitution, which provides, "Every person may freely speak, write and publish his sentiments on all subjects . . . and no laws shall be passed to restrain or abridge the liberty of speech or of the press." Art. I, § 4 of the Wisconsin Constitution addresses free association: "The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

Conservative Political Action Committee, 470 U.S. 480, 494 (1985) [hereinafter NCPAC].

¶17 Based on these principles, the Court held in Buckley that it could avoid invalidating two provisions of the FECA, the expenditure limit in § 608(e)(1)[15] and the disclosure requirements of § 434(e),[16] on grounds of vagueness only if it limited their reach to funds paid for political communications that constituted express advocacy. Id. at 44, 80. More precisely, the Buckley court held that §§ 434(e) and 608(e)(1) could only be constitutionally applied to regulate payments "for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." Id. at 44. In discussing § 608(e)(1), the Court observed:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to, public issues involving legislative proposals and governmental actions.

Id. at 42. Therefore, to "clearly mark the boundary between permissible and impermissible speech," id. at 41, the scope of political activity regulated by § 608(e) (1) must be "limited to

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[15] Section 608(e)(1) limited expenditures "relative to a clearly identified candidate" to $1,000 per year. Buckley, 424 U.S. at 39 (quoting § 608(e)(1)).

[16] Section 434(e) required an individual or group (other than a political committee or candidate) that made more than $100 in contributions or expenditures in one year "'for the purpose of . . . influencing' the nomination or election of candidates for federal office" to file a statement disclosing the amount contributed or spent. Id. at 77 (quoting § 434(e)).

communications that include explicit words of advocacy of election or defeat of a candidate," the Court held. Id. at 43.

¶18 Later in the opinion, the Court determined that the § 434(e) disclosure requirement "shares the same potential for encompassing both issue discussion and advocacy of a political result" as the expenditure limit in § 608(e)(1). Id. at 79. The Court explained that "compelled disclosure, in itself, seriously infringe on privacy of association and belief guaranteed by the First Amendment." Id. at 64. Accordingly, the Court stated:

> To insure that the reach of § 434(e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608(e)--to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.
>
> . . .
>
> As narrowed, § 434(e), like § 608(e)(1), does not reach all partisan discussion for it only requires disclosure of these expenditures that expressly advocate a particular election result.

Id. at 80 (footnote omitted).

¶19 In footnotes, the Court elaborated on the meaning of construction of §§ 434(e) and 608(e)(1) as applying only to speech which "expressly advocate[s] the election or defeat of a clearly identified candidate." Id. In footnote 52, the

Court stated that such a construction "would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" Id. at 44 n.52. Following its discussion of the express advocacy standard as applied to § 434(e), the Court included a footnote referring back to footnote 52. See id. at 80 n.108.

¶20 Although the United States Supreme Court has cited Buckley in several cases, our research discloses only one in which the Court applied the Buckley express advocacy standard: FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) [hereinafter MCFL].[17] Massachusetts Citizens for Life (MCFL) had distributed a newsletter entitled, "Special Edition," and stating in bold-faced type, "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," "VOTE PRO-LIFE," and "No pro-life candidate can win in November without your vote in September." MCFL, 479 U.S. at 243 (emphasis in original). Also printed on the newsletter were the names and photographs of 13 candidates in the upcoming state and federal elections which had voting records consistent with MCFL's position on certain issues. Id. at 243-44. The newsletter contained a coupon listing the names of the "pro-life" candidates, to be detached and taken to the polls by readers, as well as a disclaimer stating that

[17] The United States Supreme Court recently considered the constitutionality of a FECA expenditures provision, but none of the opinions delivered by the fractured Court addressed the application of Buckley's express advocacy standard. See Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996). We note that the Court has granted certiorari but has not yet heard argument in a case in which the Eighth Circuit court of appeals held that Missouri's campaign contribution limits violate the First Amendment. See Shrink Mo. Gov't PAC v. Adams, 161 F.3d 519, 523 (8th Cir. 1998), cert. granted, 119 S. Ct. 901 (1999).

"[t]his special election edition does not represent an endorsement of any particular candidate." Id. at 243.

¶21 The issue in MCFL was whether, by distributing the newsletter, MCFL had violated § 441b of the FECA, which prohibits corporations from using treasury funds for expenditures "in connection with" federal elections. Id. at 241. The Court determined that, under Buckley, § 441b would be overbroad unless the term "expenditure" in § 441b were construed as applying only to express advocacy. Id. at 248-49. Utilizing this narrowing construction, the Court held that MCFL was in violation of § 441b because its newsletter constituted express advocacy. Id. at 249-51. In reaching this holding, the Court interpreted Buckley as follows:

> Buckley adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of "express advocacy" depended upon the use of language such as "vote for," "elect," "support," etc., Buckley, supra, at 44, n.52.

Id. at 249. The Court then applied the Buckley standard to MCFL's newsletter:

> Just such an exhortation appears in the "Special Edition." The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these

> (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact.

Id. The Court concluded that MCFL's newsletter constituted express advocacy within the purview of § 441b. Id. at 249-50.

¶22 As stated previously, Buckley and MCFL comprise the entire volume of cases in which the United States Supreme Court has applied the express advocacy standard. We do not read Buckley and MCFL as requiring that a communication contain any specific "magic words" in order to constitute express advocacy. The words listed in footnote 52 of Buckley are merely examples of words which undoubtedly constitute "express words of advocacy of election or defeat," as evidenced by the Court's use of the phrase "such as" immediately preceding the list of words. Buckley, 424 U.S. at 44 n.52. Consistent with Buckley, when the Court summarized footnote 52 of Buckley in MCFL, it again introduced the words with the phrase "such as." MCFL, 479 U.S. at 249. The Court in MCFL also suggested that the list of words in Buckley's footnote 52 was exemplary, not exhaustive, when it stated, "The fact that this message [in the newsletter] is marginally less direct than "Vote for Smith" does not change its essential nature." Id. "Vote for" was one of the phrases.used in footnote 52. Buckley, 424 U.S. at 44 n.52.

¶23 Further, it would be absurd to hold that those particular "magic words" of advocacy which the Buckley Court chose to mention in footnote 52 qualify as express advocacy while other, equally explicit words of advocacy do

not. We can think of no reason to adopt an approach which would regulate an ad which said, "Defeat Smith," but not an ad which said, "Unseat Smith." See Buckley, 424 U.S. at 44 n.52. Consistent with the well-established rule that we should avoid absurd results when interpreting a statute, see Campenni v. Walrath, 180 Wis. 2d 548, 560, 509 N.W.2d 725 (1994), we hold that no particular "magic words" are necessary for a communication to constitute express advocacy.

¶24 In our view, Buckley stands for the proposition that it is unconstitutional to place reporting or disclosure requirements on communications which do not "expressly advocate the election or defeat of a clearly identified candidate." Buckley, 424 U.S. at 80. Any standard of express advocacy must be consistent with this principle in order to avoid invalidation on grounds of vagueness and/or overbreadth. See MCFL, 479 U.S. at 248-49; Buckley, 424 U.S. at 44, 80. We are satisfied that for a political communication or advertisement to constitute express advocacy under Buckley and MCFL, it must contain explicit language advocating the election or defeat of a candidate who is clearly identified.[18] See MCFL, 479 U.S. at 249-50;

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[18] It has been argued that language used by the United States Supreme Court in MCFL suggests that contextual factors are relevant in identifying express advocacy. In MCFL, the Court stated that. a newsletter was express advocacy because it "in effect" instructed readers to vote for certain candidates. MCFL, 479 U.S. at 249. In addition, the Court commented that the "essential nature" of the language is not changed even though it "is marginally less direct than 'Vote for Smith.'" Id.

The FEC made this argument in Maine Right to Life Committee v. FEC and the court in that case rejected it. See Maine Right to Life Comm. v. FEC, 914 F. Supp. 8, 11 n.2 (D. Me. 1996), aff'd per curiam, 98 F.3d 1 (1st Cir. 1996), cert. denied, 118 S. Ct. 52 (1997). The court recognized that the presence of express terms of advocacy in MCFL's newsletter, such as "vote for," undermined the contention that MCFL

Buckley, 424 U.S. at 43, 44 & n.52, 80 & n.108. The explicit terms used need not have been chosen from a specific list of "magic words."

¶25 As stated previously, there is no Wisconsin case, statute, or regulation clarifying the meaning of the term express advocacy as used in Wis. Stat. § 11.01(16)(a)l. Buckley and MCFL constitute the only authority which binds Wisconsin courts on the subject.[19] It follows, then, that if WMC's advertisements contained explicit words "advocating the election or defeat of a clearly identified candidate," the ads would be express advocacy subject to ch. 11 regulation, pursuant to the rule of Buckley and MCFL.

¶26 However, the Board does not assert that WMC's advertisements include any "magic words." Likewise, the Board does not point to any specific words or phrases in the advertisements which might qualify as explicit words which advocate the election or defeat of a clearly identified candidate.[20] To get around this, the Board urges us to find

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"loosened the Buckley requirement." Id. The Court in MCFL did not discuss any particular contextual factors in holding that the newsletter was express advocacy. See MCFL, 479 U.S. at 249-50. Also of significance is the Court's indication in another case that timing the political advocacy of a "no" vote on a controversial referendum to occur "in the heat" of the vote "only strengthens the protection afforded" by the First Amendment to the advocacy. McIntyre, 514 U.S. at 347.

[19] On federal questions, this court is bound only by the decisions of the United States Supreme Court. Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 307, 340 N.W.2d 704 (1983) (citing United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970)). The value of the opinions of federal courts of appeals and district courts is limited to their persuasiveness. See id.

[20] Unlike the newsletter in MCFL, the advertisements in this case contain no explicit references to an election, no express language suggesting that viewers or listeners should vote in a particular way, and no wording

that WMC's advertisements are express advocacy based upon the context in which they were broadcast. The Board argues that we should evaluate communications on a case-by-case basis, labeling a communication express advocacy whenever its context suggests that it is "unambiguously related to the campaign of a particular . . . candidate." Buckley, 424 U.S. at 80. Among the factors the Board contends that we should consider are the proximity in time of the communication to an election, the underlying intent of the communication, the effect of the communication, the audience, and the proximity of the geographical area in which the communication is disseminated to the voting district of the featured candidate.[21]

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identifying the featured incumbent legislators as candidates in the November election. See MCFL, 479 U.S. at 243. We point out this distinction only for purposes of clarifying the basis of the Board's argument. For the reasons made clear in the text, we do not find it necessary to determine whether WMC's advertisements qualify as express advocacy.

[21] Despite the position to the contrary taken by the dissent, it appears to us to be beyond dispute that the central premise of the Board's position was that this court should adopt a context-based definition of express advocacy. One need only glance at the following examples from the Board's briefs in order to grasp the Board's clear argument in favor of a standard based on context:

> Not only must the analysis include the character and unambiguity of the words, but the context within which the words are spoken. Justice Holmes noted in his opinion in Schenck v. United States, 249 U.S. 47 (1919), that "the character of every act depends upon the circumstances in which it is done." Schenck, 249 U.S. at 52. In Schenck the court did not ignore the fact that "in many places and in ordinary times" the defendants' circulating pamphlets which argued against conscription in the United States Army during the first World War and urged the readers to assert their rights under the Constitution and told them "[y]ou must do your share to maintain, support and uphold the rights of the people of this country" would have been within their constitutional rights. Id.

> The court's earlier decisions on First Amendment speech issues, and the Buckley decision itself, affirm what every speaker or listener knows: the meaning of speech cannot be determined without at least considering its immediate context, e.g., whether the theater was empty or crowded when the speaker yelled "fire." See Schenck, 249 U.S. at 52.

Board's Br. at 15-16.

> The state submits, however, that it is permissible in this case, as with other First Amendment standards, to look at the context in which the speech was made. Looking at context does not mean changing the standard to a subjective standard or inappropriately examining intentions or motives as respondents suggest. (Respondents' brief at 23-24.) Context is time, place and audience and is often relevant in examining First Amendment speech.

Board's Reply at 7.

> This court should consider context by examining the effect particular speech has on its audience given the particular time and place.
>
> Consideration of the context of speech is acceptable in other First Amendment venues. The doctrines of subversive speech, "fighting words[,"] libel, and speech in the workplace and in public fora illustrate that when and where speech takes place can determine its legal significance. In these instances, context is one of the crucial factors making these kinds of speech regulatable [sic]. First Amendment doctrine has long recognized that words take part of their meaning and effect from the environment in which they are spoken. See Furgatch, 807 F.2d at 863.
>
> While the Furgatch court concluded that the weight given to the context of speech may be lessened when the constitutional standard is express advocacy, it recognized

that context is relevant to a determination of express advocacy.

Board's Reply at 8. At oral argument, the Board shifted its position slightly, but continued to argue for a context-oriented standard of express advocacy:

> There is nothing in the U.S. Supreme Court that says express advocacy is the opposite of implied advocacy or express advocacy is the opposite of an issue ad. What we have to do is read these ads as a whole, look at their essential nature, look at their entire content, and decide whether they unambiguously relate to the campaign of a particular candidate. . . .
>
> I don't think there's any authority that prevents us from looking at context; in fact, on the contrary, there's a long line of U.S. Supreme Court cases that suggests what every school child knows: whether you say "fire" in an empty theater or a crowded theater makes a significant difference. If we make a very limited reference to context in this case, and I submit time, place, and audience is the context, then it clearly affirms our--our--the clear answer that these are express advocacy ads. The ads were aired shortly before the election, they were aired in a geographical area in which each of the targeted candidates were running and they were aired to an audience of voters who were about to vote for those candidates. . . .
>
> I think in determining whether an ad is unambiguously related to a campaign, a court may make a limited consideration of time, place and audience. I am not suggesting to you that context is a replacement for the Buckley standard . . . .
>
> I would say the standard is what the Buckley court stated, that it is spending that is unambiguously related to the campaign of a particular federal candidate. I would then go on to say that in determining--making that determination, certain factors can be considered, and I

¶27 It may well be appropriate to consider context in determining whether a communication constitutes express advocacy. It should be remembered that Buckley developed

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> would draw from the language of the MCFL case and the Furgatch decision. . . .

During oral argument in this court, Justice Bradley, the author of the dissent, characterized the Board's argument as one requiring a review of the context of each individual ad. Justice Bradley commented to counsel for the Board:

> There's something to be said about bright-line tests if we're dealing with large number--volumes. People have to have notice of what's expected in order to proceed. Your proposal talks about, "Let's look at the essential nature of each individual ad and review it in the context." Well, you know, that's one of those things that, after the fact, you might know if you've made a--have a problem earlier on. What kind of definition or contour are you proposing that is akin to a bright line so that people can have notice of what's expected and not expected, rather than, "Let's take a look at each one individually?"

(Emphasis added). Counsel for the Board replied, "I understand your question and much is to be said for a bright-line test in that it's more convenient--it's simpler, it's easier to follow. I submit to you that there are other constitutional standards such as obscenity and minimum contacts that are not precisely defined, that we are often in constitutional law asking courts to interpret, we are asking courts to exercise judgment, and I think that is precisely why the U.S. Supreme Court put the examples in a footnote . . . ."

We also note that the circuit court determined that the Board was attempting to apply the five-factor Crawford test for "political purpose" in this case. The Board claims in its brief in this court that it never argued that the five Crawford criteria should be used in determining whether the ads were express advocacy. In any event, we are thoroughly satisfied that in this court, the Board argued in favor of a context-based standard unrelated to the five-factor test of Crawford. See Crawford, 123 Wis. 2d at 183.

its definition of express advocacy while interpreting a specific federal statute. In FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987), cert. denied, 484 U.S. 850 (1987), the Ninth Circuit adopted a broader definition of express advocacy when it held that context is relevant in determining whether a political communication is express advocacy. The Furgatch court took the following approach, which presents an attractive alternative:

> We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible to no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.

Furgatch, 807 F.2d at 864. The court explained that under this standard, the message of the speech must be "unmistakable and unambiguous, suggestive of only one plausible meaning," it must "present[] a clear plea for action," and it "must be clear what action is advocated." Id. Context remains an "ancillary" consideration, the court stated, one "peripheral to the words themselves." Id. at 863. The court specifically relied on the timing of an advertisement (within one week of the election) in concluding that the ad was express advocacy. Id. at 865.

¶28 It should be noted, however, that Furgatch makes no mention of the United States Supreme Court's decision in MCFL, even though MCFL preceded Furgatch by nearly one month. See FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1053 n.4 (4th Cir. 1997). It is also significant that at least two courts have held that an FEC regulation adopting the context-based rule of Furgatch is an invalid attempt to

regulate issue advocacy.[22] See Right to Life of Dutchess County, Inc. v. FEC, 6 F. Supp. 2d 248, 249-50, 253-54 (S.D.N.Y. 1998); Maine Right to Life Comm. v. FEC, 914 F. Supp. 13 (D. Me. 1996), aff'd per curiam, 98 F.3d 1. (1st Cir. 1996), cert. denied, 118 S. Ct. 52 (1997). Other courts have rejected similar attempts to broaden the definition of express advocacy. See, e.g., Faucher v. FEC, 928 F.2d 468, 471-72 (1st Cir. 1991), cert. denied 502 U.S. 820 (1991); FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2nd Cir. 1980) (en banc); FEC v. Christian Action Network, 894 F. Supp. 94 6, 958 (W. D. Va. 1995), aff'd per curiam, 92 F. 3d 1178 (4th Cir. 1996).

¶29 Regardless of whether it might be permissible to consider context in defining express advocacy, we conclude, for the reasons which follow, that WMC had insufficient warning before broadcasting its advertisements that a context-based standard could be used to determine that the ads were express advocacy which would subject WMC to regulation under the Wis. Stat. ch. 11 provisions at issue.

¶30 "Because we assume that [persons are] free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Such notice is a basic requirement of due process. Grayned, 408 U.S. at 108. When First Amendment

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[22] Courts have deemed it "obvious" that 11 C.F.R. § 100.22(b) "comes directly from" the language of FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987), cert. denied, 484 U.S. 850 (1987). Maine Right to Life Comm., 914 F. Supp. at 11. See also Kansans for Life, Inc. v. Gaede, 38 F. Supp. 2d 928, 937 (D. Kan. 1999). The FEC regulations provide that a communication is express advocacy if it either meets the Furgatch-based test of § 100.22(b) or contains explicit language of advocacy. See 11 C.F.R. § 100.22 (1999).

interests are implicated by laws which may result in criminal penalties,[23] imprecise standards "may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" Buckley, 424 U.S. at 41 n.48 (quoting Grayned, 408 U.S. at 108-109). See also Baggett v. Bullitt, 377 U.S. 360, 372 (1964); Speiser v. Randall, 357 U.S. 513, 526 (1958). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." Buckley, 424 U.S. at 41 n.48 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

¶31 The Board's attempt to apply a context-based standard to the ads involved in this case amounts to an after-the-fact effort to create a standard of express advocacy which is broader than the standard existing in Wisconsin when WMC ran its ads.[24] Unlike the Board, the FEC has

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[23] Criminal penalties may result from intentional violations of Wis. Stat. ch. 11, although the Board did not opt to seek such penalties in this case. See Wis. Stat. § 11.61(1).

[24] We find it interesting that the Board's Executive Director did not apply a context-based standard in evaluating transcripts of WMC's ads prior to their broadcast. In response to a request by counsel for IMC, the Executive Director, in an October 2, 1996, letter, stated unequivocally, "It is the opinion of the Elections Board staff that these communications. are not subject to regulation under Wisconsin's campaign disclosure law." Respondents' App. at 50; R. 15 at 4. The Executive Director's opinion followed a detailed analysis of the wording of the advertisements, with no consideration of context-oriented factors. The letter only briefly mentioned that "[t]he timing of the broadcast of the ads, in the midst of a political campaign, could raise the suggestion that these are essentially candidate advocacy ads." Id.

promulgated and published its interpretation of the statutory term express advocacy, which includes a context-based test, as an administrative rule.[25] By creating and attempting to

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The circuit court apparently opted to treat WMC's motion as a straight motion to dismiss rather than a motion for summary judgment, and therefore, did not consider this letter. The letter was referred to by counsel in briefs and oral argument in this court. We mention it only as background material.

[25] The FEC rule provides:

> § 100.22 Expressly advocating (2 U.S.C. 431 (17)).
>
> Expressly advocating means any communication that--
>
> (a) Uses phrases such as "vote for the President, "re-elect your Congressman, " "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s) , such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because--
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

apply its new, context-oriented interpretation of the statutory term express advocacy, the Board has, in effect, engaged in retroactive rule-making. See Wis. Stat. §§ 227.01(13), 227.10(l); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (1988) (stating, "Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant"). See also Schoolway Transp. Co. v. DMV, 72 Wis. 2d 223, 236-37, 240 N.W.2d 403 (1976); Frankenthal v. Wisconsin R.E. Brokers' Bd., 3 Wis. 2d 249, 253-54, 88 N.W.2d 352 (1958), on motion for reh'g, 3 Wis. 2d 257a, 257b-257c, 89 N.W.2d 825 (1958). We agree with the circuit court that it would be "profoundly unfair to apply a previously unarticulated test, retroactively, to these defendants." Decision and order at 25.

¶32 The United States Supreme Court has held that a deprivation of the due process right of fair warning can occur not only from vague statutory language, but also from unforeseeable and retroactive interpretation of that statutory

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(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22. The Wisconsin Elections Board has never promulgated any comparable rule setting forth its interpretation of "express advocacy" as that term is used in the Wisconsin Statutes. As stated in footnote 10 of this opinion, Wis. Admin. Code ElBd § 1.28 (Apr., 1998), refers to express advocacy but does not attempt, in any way, to define it.

As we noted earlier (see footnote 22), the language of 11 C.F.R. § 100.22(b) comes from the language of FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987), cert. denied, 484 U.S. 850 (1987). Subsection (a) of that same regulation is clearly from Buckley. See, Buckley, 424 U.S. at 80 n.52.

language. See Bouie v. City of Columbia, 378 U.S. 347, 352, 355 (1964). The Court indicated that a due process violation resulting from retroactive interpretation of statutory language is actually worse than a vague statute because it "lulls the potential defendant into a false sense of security, giving him no reason even to suspect" that he might be subject to the statutory prohibition. Id. at 352.

¶33 Further, we decline the Board's invitation to craft a new standard of express advocacy for the state of Wisconsin. The creation of such a standard is properly the role of the legislature and the Board, not this court.[26] See Wagner Mobil, Inc. v. City of Madison, 190 Wis. 2d 585, 594 n.4, 527 N.W.2d 301 (1995) (recognizing the well-established principle that the Wisconsin Constitution requires "the separation of the legislative and judicial powers.") See also Wis. Stat. § 5.05(l)(f). The level of regulation desirable in this area depends upon public policy considerations more appropriately explored in a forum other than this court. We have described our role in areas "peppered with political perceptions and emotionally laden

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[26] The dissent argues that Buckley obligates this court to supply a definition for the term "express advocacy" in Wis. Stat. § 11.01(16)(a)l to save the statute from invalidation on grounds of vagueness. This argument misinterprets the question before us. We are not faced with the question of whether the language concerning express advocacy in Wis. Stat. § 11. 01(16)(a)1 and Wis. Admin. Code ElBd § 1.28 (Apr., 1998) is unconstitutionally vague. These statutory and code sections parrot the language used in Buckley. As we have already explained, express advocacy has been defined in both Buckley and MCFL. See MCFL, 479 U.S. at 249; Buckley, 424 U.S. at 44 & n.52, 80 & 108. In contrast, the problem in this case is that the Board is attempting to retrospectively apply to the respondents a context-oriented standard of express advocacy which has heretofore been unknown in Wisconsin law. We are under no obligation to adopt such a standard, where the lack of fair warning and, in effect, retroactive rulemaking amount to a violation of due process, and are determinative of the issue presented.

views," as one restricted to interpreting the scope of constitutional requirements. Kukor v. Grover, 148 Wis. 2d 469, 504-505, 436 N.W.2d 568 (1989).

¶34 We conclude that under the circumstances of this case, WMC, when it broadcast its advertisements, had insufficient warning that the ads could qualify as express advocacy under Wisconsin's campaign finance law. The Board's after-the-fact attempt to apply a context-oriented standard of express advocacy must fail, since, in effect, it was an unfair attempt[27] at retroactive rule-making, without any express statutory grant of authority, and thus, a violation of due process. Because this conclusion prevents the Board from prevailing in this action under any factual conditions, we affirm the circuit court's dismissal of the Board's complaint.

III.

¶35 Based on our conclusion that the Board may not regulate WMC under the campaign finance laws in ch. 11 on the basis of the retrospective application of a context-based standard of express advocacy, we affirm the circuit court's dismissal of the Board's complaint. We stress that this holding places no restraints on the ability of the legislature and the Board to define further a constitutional standard of express advocacy to be prospectively applied. We encourage them to do so, as we are well aware of the types of compelling state interests which may justify some very limited restrictions on First and Fourteenth Amendment

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[27] "[T]he concern of due process is fundamental fairness." State ex rel. Lyons v. De Valk, 47 Wis. 2d 200, 205, 177 N.W.2d 106 (1970). See In re D.H., 76 Wis. 2d 286, 296-97, 251 N.W.2d 196 (1977) (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971)); U.S. Const. amend. XIV; Wis. Const. art. I, § 1.

rights. See Gard v. State Elections Bd., 156 Wis. 2d 28, 36, 51-52, 65, 456 N.W.2d 809 (1990), cert. denied, 498 U.S. 982 (1990) (upholding a contribution limit which was found by this court to be narrowly tailored to serve the compelling state interest in preventing actual or apparent corruption of the political process). See also Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658-60 (1990); NCPAC, 470 U.S. at 496-97; FEC v. National Right to Work Comm., 459 U.S. 197, 207-208 (1982); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788-89 (1978). Consistent with this opinion, we note that any definition of express advocacy must comport with the requirements of Buckley and MCFL and may encompass more than the specific list of "magic words" in Buckley footnote 52, but must, however, be "limited to communications that include explicit words of advocacy of election or defeat of a candidate."[28]

By the Court.--The judgment and order of the circuit court is affirmed.

¶36 JON P. WILCOX, J., did not participate.

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[28] Buckley, 424 U.S. at 43. The United States Supreme Court, as noted previously, required that the candidate must be "a clearly identified" one. Id. at 80. In regard to the requirement of explicit language, we are mindful that words in one context may take on different meaning in another. We recognize that a number of courts have rejected a context-based approach, finding that it did not comport with the holdings in Buckley and MCFL. (See footnote 18 and paragraph 28 herein.)

¶37 WILLIAM A. BABLITCH, J. *(concurring).* Nobody, including the Elections Board, is attempting to stop WMC from saying anything they want to say during the election season. What is at stake here is whether the public has a right to know who is paying for whatever it is WMC wants to say during the election season.

¶38 The spin surrounding this case has been that the Elections Board is trying to stifle free speech. Not true. It's all about the public knowing who is saying what.

¶39 An informed electorate is essential to a healthy democracy. If people are told that a Ford is a great car, it is important for people to know whether Consumer Reports or Ford is saying so. Similarly, if the electorate is being told that a candidate is a great friend of education, it is important for people to know whether the teachers union or Common Cause is saying so. The answer to "Who paid?" answers a lot of questions.

¶40 That is what is at stake here, and no amount of spin should be able to hide that fact.

¶41 Having said the above, I join the majority opinion. I agree that WMC should be dismissed from the case for lack of notice regarding what constitutes "express advocacy." I would have preferred that a majority could have found its way to expressing a standard by declaring that, in the future, ads such as these constitute "express advocacy." I would have joined that result.

¶42 Nevertheless, a half loaf in this instance is far better than no loaf at all. The dissent presents a well reasoned and persuasive case as to why these ads constitute "express advocacy." Does the dissent express an acceptable standard? For me, yes. Are there the votes for it? No.

¶43 If I joined the dissent, the result would be a 3-3 vote. Guidance is needed and a tie vote does not provide guidance. A tie vote results in no opinion and therefore no standard or guidance from this court on the very issue that needs resolution. Because there is at present no appellate decision on the issue, we would have to remand to the court of appeals for their decision, then consider yet another appeal. Meanwhile, at least one or more election cycles would come and go. Wisconsin would continue to have no standard as to what constitutes "express advocacy." The legislature and the Elections Board, as well as potential advocates such as the Wisconsin Manufacturers Association, would be left completely in the dark as to whether ads that do not contain any "magic words" can be regulated. Drafters of a standard would not know whether they should even consider a context based approach.

¶44 The majority opinion, despite the words of the dissent, does provide some needed guidance. It does not provide all the guidance the dissent wants, but in this instance some guidance is better than none.[1]

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[1] I would have preferred a decision that more closely echoed the dissent in some respects, but that it is not to say that the majority opinion voices a decision with which I disagree. It is of utmost importance to provide guidance in this case, which the majority does effectively, and does correctly. That is why I join it. It does not go as far as I would prefer, but most judges have joined opinions that go a bit farther or less far than we would like. See Brown v. Board of Education, 347 U.S. 483 (1954). See also Daniel A. Farber, et al., Constitutional Law: Themes from the Constitution's Third Century SO-52 (1993); Leo Katcher, Earl Warren, A Political Biography (1967).

Judicial decision-making necessarily involves a variety of choices. Would that the best choice be always clear, but it is not. Some choices may, at first blush, appear to be preferable, but, looked at it in the perspective of the whole, are not. That is what happened here. I compromised. Most appellate judges do. Sometimes the best choice, for a variety of reasons, is not one's first choice.

¶45 By my joining the majority, the legislature or the elections board is now free to craft a standard for "express advocacy," knowing that at the least there is no requirement for "magic words," and that the court will consider as an alternative a context based approach. I invite one or the other or both to craft a standard . . . posthaste.

Judicial opinions are filled with compromise, and we should not deny it. As Benjamin Cardozo said, judges "do not stand aloof on chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do."

¶46 DAVID T. PROSSER, J. *(Concurring in part, dissenting in part)*. The First Amendment is not what it used to be. It is fashionable today to protect deviant speech[2] and expressive conduct.[3] But pure speech which discusses public issues and public officials is vulnerable to the impulse for government regulation. While I join that part of the court's decision dismissing the suit against the respondents, I dissent from much in the majority opinion.

¶47 Little is made of the fact that the respondents in this case went to the State Elections Board for guidance before broadcasting their ads. Majority op. at 28, n.24. Only after they received government acquiescence did they go forward. Thereafter, several circuit courts enjoined the broadcast of these pure speech ads while the ads were on the air. Then the Elections Board reversed its position and tried to compel the filing of various reports.

¶48 The present case is a new episode in this saga. The majority opinion appears to encourage government rule-making to extend the boundaries of "express advocacy." Rule-makers are encouraged to march through the quicksand of "context" en route to a more correct and perfect political order. The dissent can't wait for others to act; it wants the court to impose its own rules here and now. Both opinions soar into pronouncements about speech regulation after a clear majority of this court decided that we have no viable case before us.

¶49 Wisconsin Statutes regulating political expression must be very narrowly construed. 65 O.A.G. 145 (1976). If the term "express advocacy" encompasses more

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[2] See State v. Zarnke, 224 Wis. 2d 116, 589 N.W.2d 370 (1999).

[3] See Lounge Management v. Town of Trenton, 219 Wis. 2d 13, 580 N.W.2d 156 (1998); State v. Janssen, 219 Wis. 2d 362, 580 N.W.2d 260 (1998).

than the magic words enumerated in footnote 52 of Buckley v. Valeo, 424 U.S. 1, 44 (1976) (per curiam), the additional words and phrases should be explicitly disclosed. Those words and phrases must advocate the election or defeat of a clearly identified candidate by urging citizens how to vote or directing them to take other specific action unambiguously related to an election.

¶50 The First Amendment is inconsistent with rules that leave people in doubt whether their expression is regulated. It does not countenance enforcement against speech on a case by case basis where government regulators are permitted to draw inferences from circumstances or guess about people's motives.

¶51 It is probably ill-advised to make any comment about "express advocacy" in this case because it really amounts to an advisory opinion.

¶52 ANN WALSH BRADLEY, J. *(Dissenting)*. The majority cannot have it both ways: it cannot both uphold the law while at the same time decline to enforce it. Either it must acknowledge and apply the standards already established by the only two United States Supreme Court cases that have addressed express advocacy or, if that standard is unclear, it must do the business of a court and articulate a constitutional standard. Because I believe that it should do the former, and in the end it dodges the issue accomplishing neither, I respectfully dissent.

¶53 At the outset I want to note my agreement with the majority. Like the majority, I agree that no particular magic words are necessary for a communication to constitute express advocacy. Majority op. at 18. Like the majority, I agree that the contextual setting may assist in the consideration of whether an ad is express advocacy. Id. at 21-22. Like the majority, I agree that Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), and FEC v. Massachusetts Citizens for Life, Inc. (MCFL), 479 U.S. 238 (1986), constitute the only authority which binds Wisconsin courts on the issue. Majority op. at 20. The majority and I part company, however, when it declines to acknowledge and apply the already established definition of express advocacy.

I.

¶54 In dodging the issue and relegating the task of defining express advocacy to the legislature or Elections Board, the majority charts a solitary course. It appears to be the only court in the nation that requires the legislature or administrative agency to take the lead in adding further definition to express advocacy. Other courts have seen fit to tackle the express advocacy issue that the majority sweeps aside even though the statutes those courts were interpreting did not have a codified definition before them. See, e.g., Faucher v. FEC, 928 F.2d 468, 471 (1st Cir. 1991); FEC v.

Furgatch, 807 F.2d 857, 859-60 (9th Cir. 1987); FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45, 52-53 (2nd Cir. 1980) (en banc); FEC v. NOW, 713 F. Supp. 428, 433-34 (D.C. Cir. 1989).

¶55 Examining the contours of the High Court's definition of express advocacy is quintessentially a constitutional inquiry. Constitutional inquiries are ultimately the business of courts. Thus, I find it difficult to understand why the majority washes its hands of the matter.

¶56 The majority's error is further illustrated by its laudatory comments of the Federal Election Commission (FEC) rulemaking process. It sees fit to hold up for high praise the FEC's adoption of a definition for express advocacy, while at the same time castigating the inaction of the Elections Board. Majority op. at 28-30.

¶57 However, the majority fails to recognize that the FEC rule is not the product of that agency's creative juices but is little more than permissible plagiarism of various court decisions: subsection (a) is taken from Buckley, 424 U.S. at 43-44, 79-80; subsection (b) is taken from Furgatch, 807 F.2d at 864. See Maine Right to Life Committee, 914 F. Supp. at 11. Had these other courts traveled the path of the majority, the FEC rule that the majority finds so noteworthy would not have come into existence. The FEC rule followed court decisions and is based on those decisions. The courts lead and the agency rules follow. The majority errs when it reverses the equation and relegates its business to others.

¶58 If, however, the majority really believes that it could not apply the term express advocacy as found in Wis. Stat. § 11.01(16)(a)l, or in Wis. Admin. Code ElBd § 1.28 (Apr. 1998), because those provisions are too imprecise to give notice, then the majority should find that enforcement would be a denial of due process because they are

unconstitutionally vague. Instead, the majority takes the tack of mischaracterizing the Board's position and based on that mischaracterization dismisses the complaint finding a denial of the due process right of fair warning.

¶59 The majority opinion's conclusion that the complaint should be dismissed is based on a faulty foundation. It is built on the premise that the Board's definition of express advocacy is context based. It needs this premise in order to arrive at its conclusion. Such a foundation, however, mischaracterizes the Board's position.

¶60 The majority ignores the repeated statements of the Board that its position adopts the Buckley definition as applied by MCFL and that only as a fall back position does the Board address a context-based definition. Instead, the majority selects excerpts from the briefs and oral arguments that advance only the fall back position and then concludes based on those excerpts that the Board is attempting to apply an after-the-fact context-oriented standard. Majority op. at 28.

¶61 This flies in the face of the actual position the Board advanced in its brief and at oral argument. In its brief the Board takes the position that the definition of express advocacy has been established by the United States Supreme Court and no further definition or explanation of the standard is required. All that the court is required to do is apply that definition to the advertisements at issue in this case. State's br. at 9.

¶62 Similarly, at oral argument the Board repeatedly stated the position that sufficient definition of the standard could be found by applying the already established Supreme Court's definition of express advocacy. It argued that there was no need to apply a context-based definition.

¶63 In arriving at its misguided conclusion, the majority must, and does, ignore the following exchange and repeated statements of the Board setting forth its primary position.

> JUSTICE CROOKS: What's the test in your opinion?
>
> ATTORNEY FOR THE BOARD: The test that I'm suggesting is the Buckley test. The Buckley court sets forth express advocacy and it explains express advocacy by saying it's precisely related to the spending that is unambiguously related to the campaign of a particular candidate.
>
> JUSTICE CROOKS: Doesn't it also say expressly advocates a particular election result?
>
> ATTORNEY FOR THE BOARD: Right and in discussing what express advocacy means, it says, "This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular candidate." That's at page 80. I think in determining whether an ad is unambiguously related to a campaign, a court may make a limited consideration of time, place and audience. I am not suggesting to you that context is a replacement for the Buckley standard. I'm not asking you to apply anything but the Buckley express advocacy standard.

And the Board's attorney again stated:

> I submit that the content of these ads by themselves are express advocacy. It is not necessary for us to make limited reference to external events . . . .

And repeated:

> I think, and I want to be very clear about this. These ads are express advocacy in and of themselves . . . . They are express advocacy regardless of when they are run . . . .

And repeated:

> I don't think it's important to draw a line because I'm not suggesting to you that context is the test . . . .

And repeated:

> The Buckley standard prevails; the Buckley standard is express advocacy. We are not asking you to change that standard . . . .

And repeated:

> [This court] has to use the language in Buckley and the language in MCFL and apply the express advocacy standard . . . .

¶64 Contrary to the repeated requests of the Board, the majority prefers to wait for the legislature or the Elections Board to craft a definition of express advocacy. That has already been done sufficiently by the United States Supreme Court. If the majority finds that definition wanting for specificity, then it should not relegate the task of further definition to some other entity. Crafting a definition is the business of this court. Whatever it chooses to do, it most certainly should not attempt to cloak its inaction with a pervasive mischaracterization of the Elections Board's argument.

II.

¶65 Unlike the majority, I would address the issue rather than dodge it. There is no need to invite the legislature or the Elections Board to craft a new standard because the standard already exists. We need not rely on a "previously unarticulated test," majority op. at 30, or an "after-the-fact effort to create a standard of express advocacy," majority op. at 28. Rather, I would acknowledge and apply the already established standards of express advocacy set forth in Buckley and MCFL.

¶66 The Buckley Court concluded that government could regulate the disclosure of contributors when the spending is used for communications "that expressly advocate the election or defeat of a clearly identified candidate." Buckley, 424 U.S. at 80. The Court then precisely defined the express advocacy test as follows:

> This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular . . . candidate. . . . Id. at 80.

¶67 Buckley, of course, was a facial challenge to the Federal Election Campaign Act (FECA) so the Court did not have occasion to apply its test for express advocacy at that time. However, in MCFL the Court was faced with, to date, its sole opportunity to do just that.

¶68 In MCFL, a group incorporated to "foster respect for human life and to defend the right to life of all human beings, born and unborn" produced a "Special Edition" of its newsletter setting forth "everything you need to know to vote pro-life" in the upcoming November elections. MCFL, 479 U.S. at 241, 243. Though its usual newsletter was sent to

approximately 3,000 persons, MCFL printed over 100,000 copies of the "Special Edition."

¶69 The newsletter listed the candidates for each federal and state office in every voting district in Massachusetts and indicated whether that candidate's position on three issues corresponded with that of MCFL. Id. at 243. While over 400 candidates were listed, only 13 had their picture included in the "Special Edition" and all 13 were candidates whose positions aligned entirely with that of MCFL on the issues listed.

¶70 The Court determined that the "Special Edition" was express advocacy. In doing so, the Court first noted that in Buckley the Court had "concluded . . . that a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc." MCFL, 479 U.S. at 249. The Court then stated that the "Special Edition" included "[j]ust such an exhortation." Id.

> The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. Id. (emphasis added).

¶71 Were Buckley the Supreme Court's only statement on the matter, I might be more inclined to agree with those courts that have concluded that express advocacy requires the "magic words" appearing in the opinion or their

synonyms. However, to read MCFL and to see how the High Court actually applied the Buckley test, I do not believe that the test is so limited in delineating what types of speech constitute express advocacy.

¶72 If the MCFL Court had seen fit to restrict the appropriate inquiry into only the words of the "Special Edition" it would have limited its discussion to the "dangerous" language of the flyer: "Everything you need to know to vote pro-life," "Vote Pro-Life," and "No pro-life candidate can win in November without your vote in September." MCFL, 479 U.S. at 243. However, the Court did not. Id. at 249.

¶73 Instead, the Court noted that the flyer contained more than merely words. As part of its message it contained photographs of certain pro-life candidates. Id. The Court determined that the Buckley express advocacy test is not restricted to a list of possible examples set forth in a footnote. Rather, the Buckley express advocacy test looks to the essence of the advertisement's purpose.

¶74 In applying the test the Court focused on the "essential nature" of the flyer. It noted that the flyer could not reasonably be regarded as a "mere discussion of public issues" that necessarily "raise[s] the names of certain politicians." Id. The Court noted that the flyer "in effect" provided the "explicit directive" to "vote for these (named) candidates." Id. Finally, the Court noted that even if the flyer's message was "marginally less direct than 'Vote for Smith'" its "essential nature" constituted express advocacy.

¶75 In light of these writings, I cannot conclude that the Supreme Court intended express advocacy to be limited exclusively to a narrow band of exhortative words. Instead based on the MCFL discussion, we are to look at the "essential nature" of the advertisement: Is it one that merely

discusses issues, and in the process discusses candidates inextricably linked to those issues, or is it one that advocates some action for or against a candidate but does so under the guise of discussing issues? Ultimately, the question is whether the advertisement is unambiguously advocating the election or defeat of a named candidate. Buckley, 424 U.S. at 80.

¶76 This approach, labeling advertisements as express advocacy when their essential nature unmistakably advocates for the election or defeat of a candidate, is more congruous with the realities of both advertising and speech. The accuracy of this statement is reinforced with even the most superficial observations of advertising in general. Few advertisements will directly say "Buy Nike rather than Reebok" or "Drink Maxwell House coffee." Be they in the print or electronic media, advertisements normally do not include a call for action or use "magic words" to relay their message. Yet every reader, listener, or viewer knows that "Less filling, tastes great" is an unambiguous exhortation to purchase a particular type of Miller beer, and "They're Gr-r-reat!" is Tony the Tiger's unambiguous appeal to buy a box of sugar-coated corn flakes.

¶77 The approach delineated by the Supreme Court does not stand for semantic shrewdness. Rather, its approach is to look at the essential nature of the advertisement. Such an approach does not open Pandora's box either, for it only applies to those advertisements susceptible to no other reasonable interpretation than advocating the election or defeat of a candidate. This does not encompass every attempt at influencing the issues of debate through issue advertisements. It only recognizes that those advertisements' essential natures must be on issues not on candidates.

¶78 Under such a standard, there can be no doubt that the advertisements at issue here are really "exhortation[s] to

vote for or against . . . specific candidate[s]." The essential nature of these advertisements is candidate advocacy, not issue advocacy. These advertisements mention issues only as a vehicle of propping up or tearing down a particular candidate. Take away references to the candidates and precious little, if anything, would remain of the advertisement.

¶79 These advertisements are about vilifying or venerating a candidate; they are not about issues. There is a picture of a candidate and a name of a candidate that predominates each advertisement. Consider, for example, the following advertisement sponsored by WMC:

> This year, Wisconsin homeowners received their property taxes cut by almost 17%. No thanks to Senator Alice Clausing. She voted against the largest property tax cut in Wisconsin history. Then Clausing voted against an additional 36 million dollars for schools-right in her own district. Alice Clausing. Liberal on Taxes . . . Wrong on education. Call Senator Clausing. Tell her to stop voting with those Madison liberals.

¶80 While issues such as taxes and education were discussed in the advertisement, they could not reasonably be considered the advertisement's essential nature. Rather, the essential nature of this advertisement was a directive to the public to vote against Senator Clausing in the upcoming election. It unambiguously advocates the defeat of a named candidate. See Buckley, 424 U.S. at 80.

¶81 WMC also sponsored the following advertisement:

> What has Gary Drzewiecki done for Northeast Wisconsin? Homeowners will see their property taxes cut by an average of 11.5% Our children's schools will receive millions in additional state aid. And taxpayers will get spending controls on local government. Lower taxes, less spending, better schools. It's a record we can all be proud of. Call Gary Drzewiecki and tell him thanks.

Again taxes, education, and spending were issues mentioned in this advertisement. However, it is unreasonable to consider the essential nature of this ad to be anything other than express advocacy for the candidate. This was clearly not a "mere discussion of public issues" that necessarily "raise[d] the names of certain politicians." MCFL, 479 U.S. at 249. While a directive to call a candidate and thank him may be "marginally less direct than 'Vote for Smith,'" its essential nature is nonetheless express advocacy.

¶82 Finally I address the concurrence of Justice Bablitch. I am perplexed by the "half loaf is better than no loaf" analysis. I submit that whether we are left with a half loaf, a whole loaf, or no loaf at all should not drive our legal analysis and conclusions. Our job is to interpret and apply the law based on legal precedents, reason, and common sense. I agree with the concurrence as it addresses the essence of this case but disagree with its bottom-line approach.

¶83 Such an approach undermines rather than achieves the expressed goals of the concurrence. As noted at the outset the majority and dissent are in agreement that no particular magic words are necessary for a communication to constitute express advocacy, that the contextual setting may assist in the consideration of whether an ad is express advocacy, and that Buckley and MCFL constitute the only authority which binds Wisconsin courts on the issue.

¶84 We should decide those issues as to which we agree, acknowledge a divided court on the remaining issues, and remand the case to the court of appeals for a decision on the issues that divide us. The court of appeals may then apply the standard already defined by Buckley and MCFL and adopted by the majority. By joining the majority's mandate but endorsing the dissent's rationale, the concurrence effectively eliminates the possibility that the standard will ever be applied in this case.

¶85 Additionally, although the concurrence asserts that its decision is driven by a desire to get a speedy answer, the route that it has chosen will delay rather than achieve a prompt resolution. The concurrence invites the Elections Board or the legislature to establish rules, a time-consuming venture that they might not undertake. Most assuredly, any rules would be challenged and again the issue would end up before us to decide. The path espoused by the concurrence results only in further delay.

¶86 I end where I began. The majority errs in its attempt to have it both ways. It upholds the law but then turns around and declines to enforce it. It was required this day to choose which path it wished to follow: apply the express advocacy standard defined by the Supreme Court or, if that standard is too vague, craft a better standard instead. It chose to do neither. I would have followed the Supreme Court's lead and assessed these advertisements under the essential nature standard of Buckley and MCFL. Because under such a standard these advertisements are express advocacy, I respectfully dissent.

¶87 I am authorized to state that CHIEF JUSTICE SHIRLEY S. ABRAHAMSON joins this opinion.

STATE OF WISCONSIN CIRCUIT COURT DANE
BRANCH 16 COUNTY

Elections Board of State of WI,
Plaintiff,

vs. DECISION AND ORDER

Case No. 97 CV 1729

Wisconsin Manufacturers and Commission,
et al,

Defendants.

The Complaint in this case was filed on June 26, 1997 by the Elections Board of the State of Wisconsin. According to the complaint, defendant Wisconsin Manufacturers and Commerce (WMC) is a non-profit corporation.[1] WMC provides financial support to defendant WMC Issues Mobilization Council, Inc. (IMC). IMC is a non-stock, non-profit corporation located, like WMC, in Madison, Wisconsin. ABC Corporation (ABC) and XYZ Corporation (XYZ) are corporations organized under Wisconsin law. ABC is a member of WMC and provides financial support to IMC. XYZ is not a member of WMC, but also provides financial support to IMC.

The Complaint alleges that on or about October 28, 1996, the defendants sponsored and paid for television advertisements which had the political purpose of expressly advocating the defeat of Lynn Adelman, state Senator for

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[1] Defendants state in their brief that WMC is also a non-stock corporation.

Wisconsin's 28th Senate District running for re-election in the November 5, 1996 general election. The defendants paid approximately $72,378 for 227 broadcasts of the advertisement, shown on several Milwaukee area television stations which broadcast to areas in the 28th Senate District.

The ad read:

> State Senator Lynn Adelman is standing in the way of reform. Voting against curbs on frivolous lawsuits that cost Milwaukee jobs. What's worse, Adelman's made a career of putting the rights of criminals ahead of the rights of victims. Voting to deny employers the right to keep convicted felons out of the workplace. That's wrong. That's liberal. But that's Lynn Adelman. Call Lynn Adelman. Tell him honest working people have rights, too.

The Complaint alleges that on or about October 21, 1996, the defendants sponsored and paid for television advertisements which had the political purpose of expressly advocating the defeat of Chuck Chvala, state Senator for Wisconsin's 16th Senate District running for re-election in the November 5, 1996 general election. The defendants paid approximately $35,715 for 157 broadcasts of the advertisement, shown on several Madison area television stations which broadcast to areas in the 16th Senate District.

The ad read:

> You-make-the-call! Senator Chvala voted to increase income taxes, sales taxes, and capital gains taxes by over a billion dollars. Then he voted against the largest property tax cut in Wisconsin history. Is he: "A," A liberal? "B," A big spender? "C," Out of touch? Or "D," All of

> the above? If you said "D" all of the above, you made the right call! Make another right call to Chuck Chvala ... He never met a tax he didn't hike.

The Complaint alleges that on or about October 21, 1996, the defendants sponsored and paid for television advertisements which had the political purpose of expressly advocating the defeat of David S. Plombon, the former State Representative to the Assembly representing the 68th Assembly District running for re-election in the November 5, 1996 general election. The defendants paid approximately $19,798 for 103 broadcasts of the advertisement, shown on an Eau Claire area television station which broadcast to areas in the 68th Assembly District.

The ad read:

> Representative Dave Plombon voted against the largest property tax cut in Wisconsin history. More than 15% for the average Chippewa Valley homeowner. Then Plombon voted against an additional 21 million dollars in state aid for schools right in his own district. Dave Plombon. Less money for our children. Higher taxes for us. Call Dave Plombon today. Because if he's consistently voting against the Chippewa Valley, just who is he voting for?

The Complaint alleges that on or about October 21, 1996, the defendants sponsored and paid for television advertisements which had the political purpose of expressly advocating the defeat of Mike Wilder, the former State Representative to the Assembly representing the 67th Assembly District running for re-election in the November 5, 1996 general election. The defendants paid approximately $19,798 for 103 broadcasts of the advertisement, shown on

an Eau Claire area television station which broadcast to areas in the 67th Assembly District.

The ad read:

> State Representative Mike Wilder has a problem with taxes. He doesn't like to ... cut them. When it came to a 14% cut in property taxes for the average Chippewa Valley homeowners, Mike Wilder said "No." And when it came to an additional 33 million dollars in state aid for schools right in his own district, Mike Wilder turned his back on us again. Give Mike Wilder a call. Tell him you've got a problem with high taxes too.

The Complaint alleges that on or about October 21, 1996, the defendants sponsored and paid for radio advertisements which had the political purpose of expressly advocating the defeat of Representatives Wilder and Plombon. The defendants paid approximately $ 2,878 for 122 broadcasts of the advertisement, aired on several radio stations which broadcast to areas in Eau Claire, Dunn and Chippewa Counties, portions of which are part of the 67th and 68th Assembly Districts represented by Plombon and Wilder.

The ad read:

> The following message is paid for by WMC Issues Mobilization Council, Inc. --- Businesses working in the public interest. There's still one team in Wisconsin with a perfect record. It's the tax team of State Representatives Dave Plombon and Mike Wilder. They agree on most everything, voting with the Madison liberals nearly 100% of the time. In the State Assembly,

Plombon and Wilder voted against cutting property taxes for Chippewa Valley homeowners. Working together, they voted against spending controls on local government. Plombon and Wilder even voted against millions in additional state aid for Chippewa Valley schools. State Representatives Dave Plombon and Mike Wilder. The tax team of the Chippewa Valley. Liberal on taxes and spending. Wrong on education. If you don't like the way the tax team is playing with your money, call them at 1-800-362-9472. Tell them Chippewa Valley homeowners deserve lower taxes and our kids deserve better schools.

The Complaint alleges that on or about October 28, 1996, the defendants sponsored and paid for television advertisements which had the political purpose of expressly advocating the re-election of Gary Drzewiecki, the State Senator for the 30th Senate District, running for re-election in the November 5, 1996 general election. The defendants paid approximately $52,603 for 121 broadcasts of the advertisement, shown on Green Bay television stations which broadcast to areas in the 30th Senate District.

The ad read:

What has Gary Drzewiecki done for Northeast Wisconsin? Homeowners will see their property taxes cut by an average of 11.5%. Our children's schools will receive millions in additional state aid. And taxpayers will get spending controls on local government. Lower taxes, less spending, better schools. It's a record we can all be proud of. Call Gary Drzewiecki and tell him thanks.

The Complaint alleges that on or about October 28, 1996, the defendants sponsored and paid for television advertisements which had the political purpose of expressly advocating the defeat of Alice Clausing, the State Senator for the 10th Senate District, running for re-election in the November 5, 1996 general election. The defendants paid approximately $108,563 for 171 broadcasts of the advertisement, shown on Eau Claire and Minneapolis television stations which broadcast to areas in the 10th Senate District.

The ad read:

> This year, Wisconsin homeowners received their property taxes cut by almost 17%. No thanks to Senator Alice Clausing. She voted against the largest property tax cuts in Wisconsin history. Then Clausing voted against an additional 36 million dollars for schools -- right in her own district. Alice Clausing. Liberal on taxes ... Wrong on education. Call Senator Clausing. Tell her to stop voting with those Madison liberals.[2]

VIOLATIONS ALLEGED; RELIEF REQUESTED

The complaint alleges that all four defendants failed to register in violation of §11.05(1), Stats. The complaint also alleges that the defendants have not filed financial reports regarding contributions in violation of sec. 11.06(1)(a), Stats. A third allegation is that the four defendants are corporations and have made contributions for impermissible purposes in violation of sec. 11.38(l), Stats. Finally the complaint alleges that on March 14, 1997, the Elections Board ordered IMC to comply with the registration reporting provisions of ch. 11,

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[2] I have reviewed a video tape of each ad filed with the court.

Stats., by April 15, 1997. Defendant was ordered to file a campaign registration statement, and a campaign finance report showing all contributions made or received and all disbursement made and obligations incurred during 1996. Defendants failed to comply with the order of the Elections Board.[3]

The complaint requests injunctive relief requiring defendants to comply with campaign registration and reporting provisions of ch. 11, Stats. and a per diem forfeiture under secs. 11.60 and 11.38(4) for the alleged violations.

WISCONSIN STATUTES

Wisconsin has enacted a series of laws regulating campaign finance. Portions which are directly relevant to this decision are as follows.

§ 11.001 Declaration of Policy

> (1) The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. It further finds that excessive spending on campaigns for public office jeopardizes the integrity of elections. It is desirable to encourage the broadest possible participation in financing campaigns by all citizens of the state, and to enable candidates to have an equal opportunity to present their programs to the voters. One of the most important sources of information to the voters is available through

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[3] I am unclear about which defendant(s) plaintiff would like to see held responsible for the failure to file. Although there are four named defendants and the complaint alleges all four failed to file the reports, the complaint also states only that IMC was ordered to do so by the Elections Board.

the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities. Such a system must make readily available to the voters complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly. This chapter is intended to serve the public purpose of stimulating vigorous campaigns on a fair and equal basis and to provide for a better informed electorate. . . .

§ 11.01(7)(a) "Disbursement" means:

(1) A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value ... made for political purposes.

§ 11.01(16)

An act is for "political purposes" when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office....

> (a) Acts which are for "political purposes" include, but are not limited to:
>
> The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum....

§ 11.05 Registration of political committees, groups and individuals.

> (1) Except as provided in s. 9.10(2)(d), every committee other than a personal campaign committee ... which makes or accepts contributions, incurs obligations or makes disbursements in a calendar year in an aggregate amount in excess of $25 shall file a statement with the appropriate filing officer giving the information required by sub. (3).

§11.06 Financial report information...

> (1) ... each registrant under s. 11.05 shall make full reports, upon a form prescribed by the board and signed by the appropriate individual under sub. (5), of all contributions received, contributions or disbursements made, and obligations incurred....

§11.38 Contributions and disbursements by corporations and cooperatives.

> (1)(a)1. No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any

political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

STANDARD OF REVIEW

Defendants have filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted on the grounds that the advertisements at issue cannot be subject to government regulation because of First Amendment protections. Plaintiff opposes the motion to dismiss. Plaintiff has not, however, sought to convert its motion to one for summary judgment. Plaintiff seeks denial of the motion to dismiss so that the case can go to trial and it will have a chance to make a factual record.

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, and should be granted only when it is quite clear that under no conditions can plaintiff recover. Watts v. Watts, 137 Wis. 2d 506, 512 (1987) *(citations omitted)*. A claim should not be dismissed if it has any merit. Halker v. Halker, 92 Wis. 2d 645, 650 (1979). In testing the legal sufficiency of the complaint, facts pleaded by the plaintiff, and all reasonable inferences therefrom, are accepted as true. Prah v. Maretti, 108 Wis. 2d 223, 229 (1982). The pleadings are to be liberally construed, with a view to substantial justice to the parties. Watts, at 512.

Defendants first argue that under Buckley v. Valeo, 424 U.S. 1 (1976), the state may regulate candidates, campaigns and express advocacy, but cannot regulate speech about public issues and candidates. Defendants assert that under Buckley and its progeny, the context of speech and the subjective intent of the speaker are irrelevant, even if the speech carries an implicit electoral message. They argue that independent expenditures are subject to government regulation only if the messages include an explicit suggestion

advocating the election or defeat of a clearly identified candidate.

Defendants raise an additional objection to the demands of the Elections Board based on defendants' rights to privacy and freedom of association.

Plaintiff disputes defendants' contentions. Plaintiff disagrees that Buckley established a bright line standard, based solely on whether communications contain prohibited "magic words". Plaintiff argues for a rule which considers the context of the ad, and not just the express words spoken. Plaintiff contends the language of the ads meet the express advocacy criteria, and says this is even more clear when the context is considered. The ads were run the week before the election in which each of the named individuals was a candidate. Because the legislature was not in session, plaintiff suggests one should be skeptical about the professed intent to get viewers to call each candidate. The message of the ads clearly advocated defeat of the named candidate (except for the ad in reference to Gary Drzewiecki which advocates his election) and wouldn't be made clearer by the addition of some of the magic words, such as "vote against". According to plaintiff, the ads discuss issues only in the context of individual candidates; they are not general discussions of the issues which happen to mention candidates' names. The ads encourage viewers to take action against (or for) the named candidates. Plaintiff argues that not requiring disclosure of the sources of funding for the ads allows the defendants to serve as "conduits for the type of direct spending that creates a threat to the political marketplace." Federal Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 264 (1986).

DISCUSSION

In 1971 Congress passed the Federal Election Campaign Act (FECA), requiring greater disclosure of political campaign contributions, and the Presidential Election Campaign Fund Act of 1971, providing for public financing of presidential elections and tax incentives for political contributions. In 1974 amendments expanded regulation of federal election campaigns, by adopting individual contribution limits, capping total campaign spending, limiting what the candidate and the candidate's family could spend on a campaign and limiting the amount individuals could independently spend on a candidate. FECA imposed reporting and disclosure requirements on political committees and restricted the amount a political party could spend on a federal election. it also created the Federal Election Commission (FEC) to enforce its provisions.

U.S. Senator James Buckley sued, challenging the constitutionality of many FECA provisions. The Supreme Court ruled that FECA's contribution limits were constitutional. Buckley v. Valeo, 424 U.S. 1 (1976). Contributions are an indirect form of communications because they involve speech by someone other than the contributor. Id. at 21.

The Court held to be unconstitutional the Act's limitations on a candidate's expenditures from the candidate's own personal funds, its ceilings on overall campaign expenditures and the Act's independent expenditure ceiling. The Supreme Court said that independent expenditures are primary speech because they involve direct, individual expression. Any restrictions represent substantial restraints on the quantity and diversity of political speech. Id. at 19.

Section 608(e)(1) of the Federal Act provided:

> [n]o person may make any expenditure ... relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

The Court first considered whether the provision was unconstitutionally vague. The Court applied close scrutiny because the provision imposes criminal penalties in an area "permeated by First Amendment interests." Id.at 40-41. The Act itself did not define the meaning of expenditures "relative to" a candidate. The Court said that the constitutional deficiencies inherent in this undefined term can be avoided:

> only by reading §608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate.... We agree that in order to preserve the provision against invalidation on vagueness grounds, §608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.[4]

Id. at 43-44.

The Court added a footnote:

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[4] "The Court stopped short of grounding this holding in the Constitution, explaining instead that it was crafted to avoid constitutional problems." WMC v. State of WI Elections Board, No. 97-C-0288-C, slip opinion at 9, (W.D. Wis. Sept. 25, 1997), citing Brownsburg Area Patrons Affecting Change v. Baldwin, 943 F. Supp. 975, 982 n.3 (S.D. Ind. 1996).

> this construction would restrict the application of §608(e)(1) to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject.,"

Id. at 44, n. 52.

The Court then considered whether even after imposing this restrictive definition on expenditures "relative to" a candidate, the Act's cap of $1000 per year on independent expenditures was constitutional. The Court concluded that for two reasons the independent expenditure limit did not serve any substantial government interest:

> (1) Because the Act limits only independent expenditures which expressly advocate election or defeat of a candidate, it does not limit those expenditures which "skirted the restriction on express advocacy ... but nevertheless benefited the candidates' campaign." Id. at 45.

> (2) The independent advocacy restricted does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The Supreme Court held that independent expenditures might provide little or no assistance to a candidate's campaign. Id. at 46.

Because the Supreme Court concluded that the independent expenditure limitation failed to serve a substantial government interest while heavily burdening the First Amendment, it was found to be unconstitutional.

Buckley struck down the dollar limit on independent expenditures in §608(e)(1) as not serving any compelling government interest. But the same case upheld the requirement that independent expenditures which meet the express advocacy test, be subject to reporting and disclosure requirements. Section 434(e) requires every individual or group, other than a political committee or candidate, which makes contributions or expenditures of more than $100 in a calendar year (other than to a candidate or committee) to file a statement with the FEC. Although the Court had little difficulty with requirements that candidates and political committees report contributions and expenditures, it said that when the contributor is an individual, "the relation of the information sought to the purposes of the Act may be too remote". Id. at 80. This danger is removed if expenditures which individuals must report are limited to the same type of express advocacy as above.

Disclosure requirements for individuals engaging in express advocacy are upheld even though spending limits are not because disclosure requirements create only a "reasonable and minimally restrictive" effect on the exercise of First Amendment rights and disclosure serves different government interests, which are found to be compelling. Id. at 82. The requirement for disclosure:

> increases the fund of information concerning those who support the candidates... [it] shed[s] the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported.... The corruption potential of these [independent] expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies.

Id. at 81.

Since Buckley was issued by the Supreme Court in 1976 the election finance scene has changed dramatically. In 1978, reportable independent expenditures totalled $310,000. Note, Michael D. Leffel, *A More Sensible Approach to Regulating Independent Expenditures: Defending the Constitutionality of the FEC's New Express Advocacy Standard*, 95 Mich. L. Rev. 686, 690 (1996). In 1986, independent expenditures totalled $10.2 million (in a nonpresidential election year) and in 1984, a presidential election year, they soared to $23.4 million. Id. Interestingly, reported independent expenditures fell to $10.6 million in 1991-2 and $5.1 million in 1993-4. Id. It has been suggested that the drop is due to a corresponding rise in expenditures on "issue" advocacy, which do not have to be reported. Id.

A study of "issue" ads run in the 1995-96 federal elections estimated that between $135 and $150 million was spent on "issue ads", about one-third of the total spent on broadcast ads by all federal candidates. Univ. of Pennsylvania Annenberg Public Policy Center, available at HTTP://WWW.ASC.UPENN.EDU./APPC/WASHINGTON /REP16.PDF. The FEC has reported that when there is a greater than two-to-one spending advantage it translates into a 93% chance of election. Id.

Last Sunday's New York Times carried a front page story entitled "*Interest Groups Prepare to Spend on Campaign Spin*" (Attached Exhibit 1) The article concludes:

> By dictating the agenda on the issues, these outside groups could bring about a nationalization of elections that have traditionally been fought at the local level. Rather than argue over matters of intense

> concern to local voters, these groups encourage a bitter partisan debate on issues that may be of greater consequence in Washington."

Richard L. Berke, *Interest Groups Prepare to Spend on Campaign Spin*, N.Y. Times, Jan. 11, 1998, at 14.

One writer frames the critical question in this way: "*Money and the Pollution of Politics: is the First: Amendment an obstacle to Political Equality?*" Ashdown, supra n.9 .

Although this background is informative, the motion before the court raises primarily a legal question. The question to be decided today can be broken down into two parts: the state's authority to regulate, and the state's authority to regulate in the particular manner they've chosen.

1. May the state regulate independent expenditures on political ads which do not contain "magic words"?

The state wants to define express advocacy in a manner which would include some communications which undeniably advocate the election or defeat of a candidate, but which do not contain "magic words". The effect on entities like the current defendants would be two-fold:

(a) It would require registration and financial reporting for groups making disbursements for such ads;

(b) It would prohibit corporations from paying for such ads.[5] (Because §11.38, Stats. prohibits

[5] Except, perhaps, ideological corporations of the sort described in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).

disbursements by corporations for political purposes.)

The defendants argue that such regulation is prohibited by the decision in Buckley. They join those who believe Buckley created a "bright line" test: no magic words, no regulation. They also rely on a series of other federal court cases, which adopt, in one way or another, this view. FEC v. Cent. Long Island Tax Reform Immediately Comm., 616 F. 2d 45 (2nd Cir. 1980) (en banc); Faucher v. FEC, 928 F. 2d 468 (1st Cir. 1991), cert. denied 502 U. S. 820 (1991); Maine Right to Life Comm'n v. FEC, 914 F. Supp. 8 (D. Me. 1996), aff'd 98 F.3d 1 (1st Cir. 1996), cert. denied 118 S. Ct. 52 (1997).

Although this court is bound by the decisions of the United States Supreme Court on constitutional questions, it is not bound by any decision of a lower federal court. Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 307 (1983). Defendants emphasize that certiorari was denied by the Supreme Court in MRLC. Brief in Support of Defendant's Motion to Dismiss, pp. 21, 23. Defendant's argue that MRLC thus stands as "the definitive application of the express advocacy standard." Id., p. 23. This is incorrect. A denial of a petition for cert has no precedential value. Its sole significance is that fewer than four justices deemed it desirable to review the case. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917 (1950). And the Supreme Court also denied cert in FEC v. Furgatch, 807 F. 2d 857 (9th Cir. 1987), cert. denied 484 U.S. 850 (1987), a case diametrically opposed to the decision in MRLC.

Several reasons dictate a different result in this case than in the cases cited by the defendant.

First, the Supreme Court in Buckley was interpreting particular language in a particular federal statute. The key

provision of that case, which it is argued should be applied here, clearly applies to the language of the federal law:

> The constitutional deficiencies described in Thomas v. Collins can be avoided only **by reading §608(e)(1)** as limited to communications that include explicit words of advocacy of election or defeat of a candidate...

Buckley, at 43 (emphasis added). The Supreme Court had no examples of ads before it; it decided the case merely on the law itself. Buckley left open the possibility that a different record or changing circumstances would justify greater regulation of independent expenditures when it said: "the independent advocacy restricted by [sec. 608(e)(1)] does not **presently** appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. Id. at 46 (emphasis added). It is likely that the Supreme Court would consider the changes in the manner in which political campaigns are financed since their decision in Buckley (as described briefly above at pp. 14-5) to require a different response.[6]

Second, to read Buckley so literally produces an absurd result. There would be no logical basis for a distinction between political ads which could be regulated and those which could not. A few examples will demonstrate

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[6] The Supreme Court's most recent venture into resolving this question resulted in failure to reach agreement on any majority opinion, despite deciding the case upon a number of concurring opinions, leaving further doubt about the Court's present disposition in regard to this issue. "Despite its seven to two decision, the Court's splintered opinions in Colorado Rep. Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996) leave lower courts without clear guidance for analyzing campaign finance restrictions." Lisa Gordon, Comment, *Colorado Republican Federal Campaign Committee v. FEC: A Court: Divided...* 81 Minn.L.Rev. 1565, 1585 (1997).

this. Under the "magic words" interpretation, the state could regulate an ad, running the week before the election, which said "Next Tuesday vote against Senator Smith", but not one that said "Next Tuesday you'll have a chance to stop Senator Smith"; the state could regulate an ad which said "Vote against Governor Adams--he's been in office too long", but not one that said "Put an end to the reign of Governor Adams." Finally, an ad which refers without words to voting could not be regulated. A video showing a voter in a voting booth pulling a "no" switch next to the name of Congressman Jones, with a voice-over intoning the Congressman's misdeeds, could not be regulated. These distinctions make no sense, and the law should not be interpreted in a way that makes no sense. State v. Mendoza, 96 Wis. 2d 106, 115 (1980).

Third, my job is to interpret a state of Wisconsin statute. The language in Buckley relating to express advocacy came in response to whether the federal statutory language was unconstitutionally vague, a Fourteenth Amendment problem. A Wisconsin statute challenged on this ground is presumed constitutional until it is proven unconstitutional beyond a reasonable doubt. State v. McCoy, 143 Wis. 2d 274, 285 (1988).

Not every statute which is somewhat ambiguous is unconstitutional.

> As stated by the United States Supreme Court in Grayned v. City of Rockford, 408 U.S. 104, 110 (1972): "condemned to the use of words, we can never expect mathematical certainty from our language." Accordingly the standard applied to examine a statute or ordinance has been expressed as follows: "A fair degree of definiteness is all that is required to uphold a statute or regulation, and a statute or regulation

> will not be voided merely by showing that the boundaries of the area of proscribed conduct are somewhat hazy."

City of Milwaukee v. K.F., 145 Wis. 2d 24, 33 (1988) (internal citation omitted) To avoid a problem of vagueness, a statute must give a person of ordinary intelligence notice of what conduct is prohibited. Dog Federation of Wisconsin, Inc. v. City of South Milwaukee, 178 Wis. 2d 353 (Ct. App. 1988). I note that when First Amendment rights are involved, as here, an greater degree of specificity is required. Buckley, at 77, citing Smith v. Goguen, 415 U.S. 566, 573 (1974). Certainly there are many different ways to set forth requirements without being unconstitutionally vague.

The Ninth Circuit Court of Appeals provides some guidance in how to interpret Buckley. In Furgatch, the court examined an ad published in the New York Times and Boston Globe one week before the 1980 presidential election. The ad accused President Carter of degrading the electoral process and urged "Don't Let Him Do It." The FEC commenced an action against Mr. Furgatch, the individual who placed the ad, for failing to report his expenditures and failing to include a disclaimer in one of the ads. The federal law under which he was charged required any person making independent expenditures totalling more than $250 to comply with those requirements. "Independent expenditure" was defined in the statute as expressly advocating the election or defeat of a clearly identified candidate.

After reviewing MCFL, supra, and FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2nd Cir. 1980), the Circuit Court noted:

> Because of the unique nature of the disputed speech, each case so depends upon its own facts as to be almost sui generis, offering limited

> guidance for subsequent decisions. The decisions of the First and Second Circuits are not especially helpful beyond the general interpretive principles we can find between the lines of those rulings.... As this litigation demonstrates, the "express advocacy" language of Buckley and section 431(17) does not draw a bright and unambiguous line. We are called upon to interpret and refine that standard here.

Furgatch, at 861.

After reviewing the purposes of the disclosure requirements (keeping the electorate fully informed of the sources of campaign-directed speech and the possible connections between the speaker and individual candidates, and deterring or exposing corruption) the Court held:

> We must read § 434(c) so as to prevent speech that is clearly intended to effect the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act.

Id.

The Court thus rejected some of the overly constrictive rules of interpretation.

I believe Wisconsin courts are free to follow this thought process. There is no reported Wisconsin case directly on point.[7] It should be remembered that §§11.05 and

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[7] In a very closely related case, WMC sought supervisory writs against Judges Mark Frankel and Patricia McMahon for issuing temporary restraining orders involving some of the same commercials at issue in the instant case. State of Wisconsin ex rel. WMC IMC, Inc. v. Circuit Court for Dane County, (L.C. #96-CV-2498) and State of Wisconsin ex rel.

11.06 are requirements only for registration and reporting regarding independent expenditures. They do not impose caps on the amount of independent expenditures permitted. Reporting requirements have only a "minimally restrictive" effect on First Amendment rights. Buckley, at 82.

It is important to emphasize that the current case involves expenditures by corporations.[8] Although a definition of express advocacy which would capture a wider pool of expression is facially neutral, its impact on corporations is greater because corporations are not permitted to make expenditures for purposes of express advocacy. This does not mean that the state can't adopt regulations that have this impact. Many courts have recognized a variety of compelling governmental interests justifying the regulation of corporate spending for purposes of political speech. *See, e.g.*: FEC v. National Right to Work Comm., 459 U.S. 197 (1982), (Act's prohibition reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation, in part to ensure that substantial aggregations of wealth which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions. Id. at 207-10.);

WMC IMC, Inc. v. Circuit Court for Milwaukee County, (L.C. #96-CV-8317) . The resulting decision dated November 8, 1996, is unpublished and I do not, therefore, rely on it. However the cases are so intertwined that it might be argued that the Court of Appeals decision is part of the law of this case, and therefore I feel comfortable quoting the decision as follows:

> Moreover, we are not persuaded that Buckley established a bright line test, particularly in view of its progeny, including [Austin; Furgatch; and Crawford].

[8] Although not much factual information has been presented about these corporations, the court has the impression that the parties agree they are not of the purely ideological sort which escaped regulation in MRLC.

FEC v. Nat'l. Conserv. Pol. Action, 470 U.S. 480 (1985) ("[P]reventing corruption or the appearance of corruption are ... legitimate and compelling government interests ... for restricting campaign finances." Id. at 496-97 Court reiterated that this interest "supported the restriction of the influence of political war chests funneled through the corporate form." Id. at 500-501.); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (Preserving the integrity of the electoral process, preventing corruption, and "[sustaining] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" are interests of the highest importance. Id. at 788-89); Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) ("[The state's] regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects that of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas. The mere fact that corporations may accumulate large amounts of wealth is not the justification for [the regulation]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures." Id. at 659-60); and McIntyre v. Ohio Elections Comm., 514 US 334 (1995) ("Curriers of favor will be deterred by the knowledge that all expenditures will be scrutinized by the Federal Election Commission and by the public for[signs of abuse]." Id. at 356.).

Our Supreme Court has previously found that the State of Wisconsin has a compelling state interest in preventing corruption or the appearance of corruption in regulating its elections. Gard v. State Elections Board, 156 Wis. 2d 28, 58 (1990)

For all of these reasons, I conclude that the State of Wisconsin Elections Board may adopt a definition of

"express advocacy" other than the one described in Buckley, so long as the definition itself meets constitutional requirements under the First and Fourteenth Amendments.

2. Can the State define "express advocacy" in the manner they have in this case?

Sec. 11.01(16), Stats. says that acts which are for "political purposes" include, but are not limited to [express advocacy].

Section 11.05(l)(f), Stats., granted the Elections Board the power to:

> Promulgate rules under Ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns or ensuring their proper administration.

Pursuant to that authority, the Board promulgated Wis. Adm. Code, §ELBd 1.28(2)(c), containing the express advocacy standard. The Elections Board also has the authority, pursuant to statute, to "flesh out" the meaning of that term.

In its brief, the Elections Board states that the application of the express advocacy standard will be decided on a case-by-case basis. The state argues that it would regulate communications with a "political purpose", as defined in §11.01(16), stats., that is, communications made for the purpose of influencing the election or nomination for election of any individual to state or local office. In deciding on a case-by-case basis whether particular campaign speech meets the political purposes criteria, the Elections Board would apply the criteria set forth in Crawford v. Whittow, 123 Wis. 2d 174, 183 (Ct. App. 1985). Crawford involved a prosecution resulting from the inclusion of a political

message in tax bills sent out by the City of Milwaukee. State law prohibits the use of public funds to mail a political message. The Court of Appeals considered whether the message was sent out for political purposes, as defined in §11.01(16), Stats. The court declined to apply the "express advocacy" standard of Buckley, finding that the statute prohibiting the use of public funds in this manner did not implicate the same constitutional freedoms at issue in Buckley. The court relied on an opinion of the state Elections Board[9] to adopt a five-part test to define political purpose: (1) the distributor's intentions as to political office; (2) the content of the materials; (3) the manner of distribution; (4) the pattern and frequency of distribution; and (5) the value of the distributed materials. Crawford, at 183.

Apparently the Elections Board has not formally adopted this standard or published it so that those wishing to place political advertisements would know it was to be applied to them. The defendants in this case were not informed prior to the receipt of the state's brief that the five-factor test would be applied to evaluate the nature of their activities. It is profoundly unfair to apply a previously unarticulated test, retroactively, to these defendants.

Even if defendants had prior notice of the standard being applied by the Elections Board in this case, dismissal would be warranted because the standard cannot withstand scrutiny on vagueness grounds. The five factors give no guidance to a reasonable person, wishing to avoid crossing the line into illegal campaign spending, of what activities constitute a violation. it is impermissible to determine application on a case-by-case, ex post facto basis. For example, what difference does it make what the distributor's intentions are "as to" political office--if the distributor is not a candidate, does that mean the communication is not for a

[9] Op. El. Bd. 76-12 (1976).

political purpose? What frequency of distribution would require enforcement under the law--how many is too many? What value of distributed materials would cross the line--how much is too much? No answer to these questions can be gleaned from a listing of the five factors. It is absolutely impossible for a group wanting to publish a political message to determine ahead of time whether they would be subject to prosecution. The five factor test is unconstitutionally vague. I also would question whether application of these five factors, which seem ill-suited to determination of whether something is express advocacy, would meet the requirement that regulation of political expression be narrowly tailored to meet the government interest involved.

This is not to say, however, that the Elections Board could not adopt a definition of express advocacy to be applied prospectively to political communications. Many such standards have been suggested. For example, the McCain-Feingold Bill, 1997 S. 25 contains the following:

> (20) Express Advocacy. (A) In general. The term "express advocacy" means a communication that advocates the election or defeat of a candidate by-
> (I) Containing a phrase such as "vote for", "re-elect", "support", "cast your ballot for", "(name of candidate) for Congress", (Name of Candidate) in 1997", "vote against", "defeat", "reject", or a campaign slogan or words that in context can have no reasonable meaning other than to advocate the election or defeat of 1 or more clearly identified candidates;
> (II) Referring to 1 or more clearly identified candidates in a paid advertisement that is broadcast ... within 60 calendar days preceding the date of an election of the candidate... ; or

> (III) Expressing unmistakable and unambiguous support for or opposition to 1 or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election.... (Exclusions which follow omitted.)

One author suggests a two-part standard. Part one would require registration for ads which contain "magic words". Part two would regulate any message that refers specifically to a candidate and is broadcast or circulated within the five days preceding the election. Allison Rittenhouse Hayward, Note, *Stalking the Elusive Express.Advocacy Standard*, 10 J.L. & Pol'y 51, 87-88 (1993).

Another proposal would regulate as express advocacy a message that shows a candidate's likeness or that uses a candidate's name and which is broadcast 30 days before a primary election or 60 days before a general election. Joel Bleifuss, *Taking Issue -- Would Regulating Advocacy Ads Restrict Free Speech?*, Capital Eye, Nov. 15, 1997, 1, at 7.

The FEC has adopted its own regulations covering express advocacy. The first section contains an expanded list of "magic words." 11 C.F.R. § 100.22(a) The second section provides contextual guidelines:

> Expressly advocating means any communication that ....
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because

> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action. 11 C.F.R. § 100.22(b).[10]

I am certainly not ruling that any of these standards, if adopted in Wisconsin, would meet constitutional requirements. I am simply stating that the Elections Board has the authority to adopt a definition of express advocacy which does meet constitutional demands. The current definition does not, and the state cannot be permitted to proceed with this action without a valid legal basis. For that reason the motion to dismiss must be granted.

CONCLUSION

The motion to dismiss for failure to state a claim is granted. The political communications in question do not include any "magic words" such as "vote for" or "defeat". The state Elections Board has the authority to adopt a definition of "express advocacy" which is broader than mere "magic words". They have not done so. Their attempt in this action to apply the five-factors test of the Crawford case must fail, because those factors create an unconstitutionally vague standard for prosecution, and because they are not narrowly tailored to meet compelling government interests. If the Elections Board adopted a definition, it could be applied prospectively, but could not be applied to these defendants for these political ads because they had no notice of the

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[10] Although the FEC's contextual approach has been rejected by the 1st Circuit Federal Court of Appeals, their decisions, as noted above, are not binding on Wisconsin state courts.

standards to be applied. Therefore there is no valid legal basis at this time on which this prosecution can be continued. In light of this conclusion, it is not necessary to decide the defendants' objections to these proceedings on the basis of violation of their privacy and associational rights.

IT IS ORDERED THAT THIS ACTION IS DISMISSED WITH PREJUDICE.

DATED: January 16, 1998

BY ORDER OF THE COURT:

/s/ Sarah B. O'Brien
Sarah B. O'Brien, Judge
Circuit Court, Branch 16

INTEREST GROUPS PREPARE TO SPEND ON CAMPAIGN SPIN

A PREVIEW IN CALIFORNIA

As '98 Election Season Opens, Issues and Ads Are Beyond Control of Candidates

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By RICHARD L. BERKE

SANTA BARBARA, Calif., Jan. 10 – So many independent interest groups are poised to spend large sums on advertising to influence elections this year that Republicans and Democrats alike fear the candidates may find themselves playing bit parts in their own campaigns.

The first Congressional campaign of 1998, here on the central California coast, offers a preview. Flip on the television or radio and it sounds in the advertising as if the contenders in Tuesday's special election want to talk about term limits or abortion.

But the candidates themselves insisted in interviews that they would prefer to debate other issues, like education and taxes. Instead, many commercials and direct-mail drives are being orchestrated by groups whose officials know nothing about Santa Barbara except what they might have seen in the defunct television soap opera bearing its name.

EXHIBIT 1

"Is this the future of campaigns?" asked Tom J. Bordonaro Jr., a Republican State Assemblyman who is seeking the seat. "Pretty soon, all we're going to have to do is file and sit back and let all these independent expenditures run the show. It's going to be rolling the dice whether you get into office or not."

By paying for their own commercials rather than donating directly to a candidate, these groups find that they have more control over the campaign discourse. They can also skirt Federal contribution limits and disclosure regulations by trying to help (or, more often, hurt) a candidate with their own advertisements.

Spending by these groups rivals candidates' own television budgets. Their commercials frequently name candidates directly and are often difficult to distinguish from those written, produced and paid for by the campaigns.

Interest groups were instrumental in helping Republicans win back Congress in 1994, and they proliferated in the 1996 campaign. But political strategists, campaign finance experts and officials of the groups themselves said they expect this to be a pivotal year in which groups from both left and right transform politics by dominating races at all levels around the country.

Gary Bauer, a prominent conservative who last year set up an anti-abortion organization, the Campaign for Working Families, said the group was pumping $100,000 into television commercials in the district this weekend to help Mr. Bordonaro. Mr. Bauer said the special election here was only a precursor.

"We intend in the months ahead to be in races all over," Mr. Bauer said, adding that his efforts here have given

the late-term-abortion issue "a much higher profile than it would have had" in the race.

By dictating the agenda on the issues, these outside groups could bring about a nationalization of elections that have traditionally been fought at the local level. Rather than argue over matters of intense concern to local voters, these groups encourage a bitter partisan debate on issues that may be of greater consequence in Washington.

Political parties have also been spurred to mount their own independent campaigns in the wake of a United States Supreme Court ruling in 1996 that the Federal Government may not limit how much the parties spend to help candidates – unless the party and candidates are working together.

"Our sense is that both parties will engage in running issue ads at all different levels of the Federal elections," said Dan Sallick, communications director of the Democratic Congressional Campaign Committee, which helps elect Democrats to the House. "In 1998 people are much more familiar with the law and will make an effort to run ads that benefit the party through talking about the issues we care about most."

Yet Mr. Sallick said the campaign committee was so concerned about the spending by these groups that it was urging candidates to devote even more time raising money so they can compete. "We counsel a lot of candidates to be more aggressive in their fund-raising efforts," he said. "We want them to have the opportunity to get their message out."

By bypassing candidates' campaigns, the outside groups can operate underground; it can be difficult to trace on whose behalf they operate and how they are financed.

"We're bound to see a substantial increase in expenditures for issue ads for a number of reasons, but the first is that they appear to work," said Larry J. Sabato, a government professor at the University of Virginia and an authority on interest group advertising. "Secondly, there's no better way of bringing attention to an issue agenda. If these interest groups contributed the money directly to the candidate, then it's up to the candidate's consultants and managers to decide what issues to stress.

"And the third reason," Mr. Sabato continued, "is it's a trend. The internal energy builds on itself." He also said he believes many groups have turned to issue advertisements out of concern that efforts to change the campaign finance system would further limit how much they could directly spend on candidates.

The issue commercials may pack a special punch in the special election here in the 22d Congressional District, because there are no other campaigns and, thus, no competition for media attention. The contest is being held to complete the term of Representative Walter Capps, a Democrat who died of a heart attack in October after just 10 months in office.

The election is essentially an open primary, where voters can cross party lines to make their choices. Mr. Capps's widow, Lois, is seeking to replace him. The other major candidates are two Republicans, Mr. Bordonaro, the only staunch conservative in the race, and Brooks Firestone, a centrist and heir to a tire manufacturing fortune. The winner has to get more than 50 percent of the vote or there will be a runoff.

At a final candidates' forum on Friday, Mrs. Capps remarked: "This race is not about the Republican Party. It's not about the Democratic Party or any national agenda."

That may have been wishful thinking. Some of the candidates' debates have revolved around issues like abortion that were raised in advertisements by the outside groups.

"The independent expenditures give me the willies," Mr. Firestone said. "We have a host of issues that need to be addressed by mature, intelligent people, and along come the outside groups who by sheer weight of money and emotion drive the debate on issues that wouldn't otherwise involve the 22d District."

Mr. Firestone began broadcasting a commercial of his own this weekend that was responding to an advertisement from Mr. Bauer's group. "These negative ads are wrong and they are shameful," Mr. Firestone says in the commercial.

The three candidates have been both targets and beneficiaries of outside commercials. Despite his grousing about the groups, Mr. Bordonaro has probably been helped the most because his campaign has the least to spend on its own. His campaign has raised about $130,000 thus far, and Mr. Bauer's group alone said it was spending $100,000 to help him.

Mr. Bauer's original television commercials attacked Mr. Firestone for voting against a late-term abortion ban in the California Legislature that Mr. Bordonaro supported. Local television executives refused to broadcast the commercials because they considered the language too graphic. But the ban drew attention that led to valuable publicity for the issue – and for Mr. Bauer's group. In the past few days, local stations relented and began running toned-down commercials.

Another group that had not before injected itself in Congressional races is the Catholic Alliance, which says it is

spending $25,000 to distribute 100,000 voter guides at local churches on Sunday to point out the candidates' positions on issues like abortion, school vouchers and homosexual marriages. Mr. Bordonaro by far outscores his rivals in the alliance's tally.

Though he has drawn from his personal fortune, Mr. Firestone has also been the beneficiary of some of the commercials. Over the Christmas holidays, when the Firestone campaign did not run advertisements, an outside group that calls itself the Foundation for Responsible Government said it spent more than $50,000 for a commercial that praised Mr. Firestone, saying he "voted repeatedly to cut our taxes." The foundation is headed by Lewis M. Eisenberg, a Wall Street financier and a centrist Republican who is close to Gov. Christine Todd Whitman of New Jersey. In recent days, the group has poured another $31,000 into advertising.

An organization based in Spring Green, Wis., Americans for Limited Terms, said it was spending $90,000 for a television and mail campaign in the district to ridicule Mr. Bordonaro for not joining with Mrs. Capps and Mr. Firestone in pledging to limit their terms.

"The shell game was a standard of the con men of old," the announcer says in a 30-second commercial. "Today it's become a favorite of politicians. Take Tom Bordonaro. He says he's for term limits. But he refuses to limit his own terms."

A more familiar organization, the A.F.L.-C.I.O., is flooding the district with persuasion mail intended to help Mrs. Capps.

Mr. Bordonaro is also the target of a mailing and get-out-the-vote drive sponsored by the Planned Parenthood

Action Fund in New York and a California affiliate. They said they are spending $40,000 on an independent campaign that describes Mr. Bordonaro as a "follower of religious political extremists."